## *United States Court of Appeals*
## *for the Second Circuit*

# APPELLANT'S
# APPENDIX

# 77-2106

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 77-2106

LOUIS CHARLES KING,

Petitioner-Appellant,

-v.-

UNITED STATES OF AMERICA,

Respondent-Appellee.

On Appeal from the United States District Court
For the Northern District of New York

## APPELLANT'S APPENDIX

UNITED STATES COURT OF APPEALS
FILED
OCT 25 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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PAGINATION AS IN ORIGINAL COPY

# APPELLANT'S APPENDIX

## TABLE OF CONTENTS

This Appendix is in two parts, separated by one colored slipsheet. Each part is separately paginated. The first part (1, et. seq.), contains the Docket Sheets, Pleadings, Opinion of the District Court, and Notice of Appeal. The second part (A.1, et. seq.), is the Appendix which was filed in the District Court, and retains its original pagination.

## PART I

| | Page |
|---|---|
| Docket Entries | 1 |
| Motion to Vacate Judgment and Sentence and for Other Relief Incidental Thereto | 11 |
| Detailed Table of Contents of Motion | 11 |
| Affidavit of Counsel | 83 |
| Affidavit of Petitioner | 89 |
| Memorandum of District Court Directing Filing of Response to Petition, and Sealing of File | 99 |
| Government's Memorandum in Opposition | 101 |
| Reply Memorandum in Behalf of Petitioner | 143 |
| Opinion and Order of District Court Denying Petition | 163 |
| Notice of Appeal | 191 |

## PART II

Appendix Filed in District Court------------------ A.1-A.318

(Preceded by Detailed Table of Contents)

CRIMINAL DOCKET 73-CR 9

D STATES DISTRICT COURT

orm No. 160 Rev.

TITLE OF CASE

CLOSED THE UNITED STATES

vs.

LOUIS CHARLES KING, JR
5531 Sunrise Terrace, Utica
ALBERT J. MARRONE-severed 2/16/73

JAMES VINCENT TALERICO-closed
802 Rutger St, Utica
JACK ZOGBY -closed
1148½ Leeds St, Utica
CARL J. MAZZA -closed
1154 Conklin Ave, Utica
JOHN DOE (Delwright Dyman)

ATTORNEYS

*For U. S.:*

James M. Sullivan, Jr.
Welch

*For Defendant:*

King-Louis Brindisi, 792 Bleecker, U
Talerico-Joseph Manganelli, 1st Bk Bldg U
Zogby-John C Scholl, asgd, 1st Bk Bldg, U
Mazza-J Longretta, 28 Hopper St, U
Marrone-Joseph Deery, asg, 1st Bk Bldg U
Dyman - Desires no atty [illegible]
[illegible]

| STATISTICAL RECORD | | COSTS | | DATE | NAME OR RECEIPT NO. | REC. | DISB. |
|---|---|---|---|---|---|---|---|
| Talerico | $20,000 | | | 12/16 | [illegible] | 5 00 | |
| J.S. 2 mailed King | 10,000 | Clerk | | 1/12 | US [illegible] | | 5 00 |
| J.S. 3 mailed | | Marshal | | | | | |
| Violation | | Docket fee | | | | | |
| Title | | | | | | | |
| Sec. | | | | | | | |

| DATE 1973 | PROCEEDINGS |
|---|---|
| Jan 18 | Filed Indictment-viol: 18:USC Sec 892(a) and 894-extortionate extension of credit 7 cts |
| | JS2 |
| Jan 29 | Filed Notice of Motion Feb 1, 1973 |
| Feb 1 | Defendant King is arraigned and pleads not guilty. Bail continued |
| | Defendant Marrone is arraigned and pleads not guilty. Bail continued |
| | Defendant Talerico is arraigned and pleads not guilty. Bail continued |
| | Defendant Zogby is arraigned and pleads not guilty. Bail continued |
| | Defendant Mazza is arraigned and pleads not guilty. Bail continued |
| | Mr. Marrone withdraws motion for severance. Motion granted |
| | Mr. Brindisi argues motion for severance on behalf of deft King |
| | Judge MacMahon reserves decision on motions for severance in 72CR283 and this Ind |
| Feb 20 | Filed Trial memorandum of The United States of America |
| Feb. 20 | Filed Sealed envelope containing FBI Report read in camera by Hon. Lloyd F. MacMahon USDJ-Sitting by designation. (Court Ex. #3501 and placed same in safe in Clerks office as per direction of Judge MacMahon) |
| Feb 21 | Filed demand for list of alibi witnesses-King |
| | Filed deft Zogby's answer to Govt's demand for list of witnesses |
| Feb 21 | Filed order and petition for writ |
| | Issued writ for John Longo-Feb 23, Utica |
| Feb 21 | Filed order and petition for writ, issued writ-Albert J. Marrone, Feb 23, Utica |

| DATE<br>1973 | PROCEEDINGS |
|---|---|
| Feb 16 | Deft Marrone is severed on motion of his atty and consent of Go[illegible] |
| Feb 21 | Filed Memorandum of law deft Talerico |
| Feb 20 | Trial moved by US Atty. Motion in Chambers. Motion [illegible] |
| | 2 extra are allowed by Court. Motion to sequester jury. Mot[illegible] |
| | in Chambers re: deft Marrone. continue hearing Feb 21 |
| Feb 21 | Jury drawn and sworn. Jury is sequestered. Motion for suppression [illegible] |
| Feb 22 | Trial continued |
| Feb 23 | Trial continued. Motion for mistrial as to deft Mazza, [illegible] |
| | is held. Mr Longretta moves for suppression of evidence. Motion [illegible] |
| | renews motion for mistrial. Motion denied. Mr. Brindisi requests Govt [illegible] |
| | Mr. Sackman's notes that he testified to having yesterday, Judge [illegible] |
| | suppression of certain tapes. Tapes played to Jury. 4:25 PM Mrs. [illegible] |
| | is excused from further consideration of trial and is replaced by alt[illegible] |
| | Mrs. Miller has read portion of transcript of tapes which was [illegible] |
| | extracted by Govt |
| Feb 25 | Warrants for defts Talerico, Zogby Mazza ordered, bail revoked. Issued [illegible] |
| Feb 26 | Filed deft Talerico's request to charge. |
| | Mr. Brindisi moves for mistrial on grounds deft King unable to proceed, Govt [illegible] |
| | Motion denied. Deft King is to be tried in his absence. Judge directs Mr. B[illegible] |
| | moves to voir dire jury. Motion denied. Mr. B moves that trial be conducted [illegible] |
| | Lukes Hospital. Motion denied. Mr. B moves deft be able to testify at Hospital. |
| | reserved. Mr Longretta joins motion for voir dire. Same rulings. Trial resumed. [illegible] |
| | produces Mr. Sackman's notes. Deft King moves for judgment of acquittal on [illegible] |
| | as well as all defts, Motions denied as to all defts. Govt rests. Deft is [illegible] |
| | Mr. Brindisi moves Court resume at 10 AM tomorrow at Alden Calder wing. Mr. [illegible] |
| | moves for reinstatement of bail for deft Talerico. All defts join. Denied. |
| Feb 27 | Filed deft's addl request to charge. Filed Govt's addl request to charge. Filed [illegible] |
| | Exh #1-sealed. |
| | Trial cont. Conference in St Lukes Hospital with counsel and reporter. 10:55 Tri[illegible] |
| | continued. Deft King moves for judgment of acquittal. Motion denied. all deft [illegible] |
| | Motions denied. Govt rests. Defts rest. Evidence closed |
| | Trial continued at Court room at 2:PM-All counsel sum up. Recess to 10 AM tomorrow |
| Feb 28 | Trial continued. Judge MacMahon charges the jury at 10:29 to 11:42 AM. Alternate j[illegible] |
| | excused. 11:44 AM Jury retires in charge of two sworn officers to consider their |
| | verdict. Various requests for transcripts and tapes are made. Jury brought into Cou[illegible] |
| | at 10:33 PM and excused from deliberation in this case until 10 AM tomorrow. Jury is |
| | removed in charge of sworn officers. |
| Mar 1 | Trial continued. Jury continues deliberation. 12:17 PM Jury reach a verdict: |
| | Deft Louis Charles King-Guilty-cts 1,2,3,4,5,6,7 |
| | Deft James Vincent Talerico-Guilty-cts 4,7 |
| | Jack Zogby-Guilty-cts 2,7 |
| | Carl J. Mazza-Guilty-cts 6,7 |
| | Motions for judgment of acquittal are heard by Court. Mr. B requests time to make |
| | motions. Court in recess to 3 PM. 3 PM all motions are heard with defts present. |
| | Motions for judgment of acquittal heard and argued. Denied. Any motions for new |
| | trial are denied. Mr Manganelli moves for reinstatement of bail for deft Talerico. |
| | Denied. Judge MacMahon directs that a hearing be held this afternoon re: |
| | voluntary absence of deft King at trial subsequent to alleged incident on Sat night. |
| | 4:20 PM Mr. Brindisi requests that he withdraw his request for hearing as to vol |
| | absence of deft King. Court finds that there was a voluntary absence of deft King |
| | subsequent to Sat night Feb 24, 1973. Judge MacMahon sets date for sentencing for |
| | defts Talerico, Zogby and Mazza for Mar 23, 1973 at 10 AM at Utica. |
| | Judge directs that Mr. Brindisi and Mr. Welch report not later than Mar 16 as to |
| | condition of defts. |

| DATE | |
|---|---|
| 1973 | |
| Mr 2 | Filed Memorandum of Law |
| | Filed questions to jurors |
| | Filed Govt exh #1,5,6,14 |
| | Filed Court exh #2,2A,3,4,5,6,7,8 |
| | Filed Deft exh #K-1 |
| | Filed Govt's proposed instructions |
| Mar 5 | Filed return of writ of habeas corpus-Marrone |
| | Filed warrants-Zogby,Talerico,Mazza-ex Feb 25, 1973 |
| Mar 7 | Filed writ for John Longo and petition and order |
| Mar 14 | Filed Notice of motion for revocation of bail and Judge [illegible] ord. |
| | revoking bail of deft King |
| Mar 15 | Filed letter from atty Deery setting trial for May, June, [illegible] |
| | Judge Port's answer waiving 6 mos rule and setting case for May, [illegible] |
| Mar 23 | The Court advised defendant Talerico of his right to speak in his [illegible] |
| | defendant declined, his attorney spoke. Defendant is sentenced on [illegible] |
| | the custody of the Attorney General or his authorized representative, [illegible] |
| | Section 4208(b) of T18 USC for study, report and recommendation, as [illegible] |
| | in Sec 4208(c) of T18 USC. This commitment is deemed to be for the [illegible] |
| | consecutive sentence prescribed by law, to wit, forty years [illegible] |
| | $20,000 fine, unless altered, pursuant to said section, upon receipt of |
| | and recommendations. The result of such study, together with any [illegible] |
| | which the Director of the Bureau of Prisons believes will be help[illegible] |
| | the disposition of the case, shall be furnished to the Court within [illegible] |
| | after commitment. LFMacM (Bail pending appeal is denied)-Custody Mar[illegible] |
| | The Court advised defendant Zogby of his right to speak in his own behal[illegible] |
| | spoke, his attorney spoke. Defendant is sentenced to be confined in any i[illegible] |
| | designated by the Attorney General for a period of ten years on counts 2 [illegible] |
| | run concurrently with each other. Remanded to custody of Marshal. Defen[illegible] |
| | for bail pending appeal. Motions denied. ~~Remanded to~~ LFMacM |
| | The Court advised defendant Mazza of his right to speak in his own behal[illegible] |
| | spoke, his attorney spoke. Defendant is sentenced on each of counts 6 & 7 to |
| | confined in any institution designated by the Attorney General for a peri[illegible] |
| | ten years, to run concurrently with each other. Remanded to custody of Mar[illegible] |
| | Bail pending appeal is denied. LFMacM |
| | All defendants advised of right to appeal |
| Mar 23 | Filed Notice of Appeal-Talerico-copy US Atty |
| | Filed Notice of Appeal-Mazza-copy US Atty |
| | Filed Notice of Appeal-Zogby-copy US Atty |
| | Sent docket entries and copy of Notice of Appeal to A. Daniel Fusaro, Ct of Ap[illegible] |
| Mar 30 | Filed Judgment-Talerico-2 copies Marshal's office |
| | Filed Judgment-Mazza-2 copies Marshal's office |
| | Filed Judgment-Zogby-2 copies Marshal's office |
| Apr 2 | Filed Petition and order for return of cash bail-Mazza |
| Apr 9 | Filed CJA 21-cpy 2 & 5-Zogby-M. Frank Sack |
| Apr 13 | Filed copy of affidavit of John Scholl |
| Apr 16 | Filed Notice of Motion and affidavit of Marrone for Apr 23 at Utica for co[illegible] |
| | transcript |
| Apr 17 | Filed Commitment-Talerico-ex Apr 12, 1973 USP, Lewisburg, Pa |
| | Filed Commitment-Zogby-ex Apr 12, 1973, USP, Lewisburg, Pa |
| | Filed Commitment-Mazza-ex Apr 12, 1973, USP, Lewisburg, Pa |
| Apr 20 | Filed order directing clerk to retain certain parts of record and exhibits, [illegible] |
| | in this district pending trial of deft Marrone |
| Apr 23 | Motion toobtain transcript, etc. Submit CJA 21 to counsel |
| Apr 23 | Filed designation of exhibits |
| Apr 25 | Filed designation of exhibits to be forwarded to CCA-Talerico |

|  | PROCEEDINGS |
|---|---|
| 27 | Filed CJA 21-cpy 5-for Marrone trial |
| y 14 | Filed petition and order to produce deft King May 24 at Utica at 9:30 AM |
| y 15 | Filed motion to suppress tape recorded conversations |
|  | Filed supplemental memorandum of law |
| ay 15 | Trial moved by U. S. Attorney. Jury drawn and sworn-sequestered. |
|  | Court grants motion for motions to be heard without presence of press and public, in Judge's Chambers. |
|  | Mr. Deery moves for non-public trial. Decision reserved until tomorrow |
|  | Mr. Deery moves for suppression of evidence, and for production of certain statements made by FBI agents or Govt attys. Judge directs that Govt search their files to obtain such statements and produce same to Court for in camera inspection, to determine whether there is any exculpatory material and if so, same shall be given to defense counsel. |
|  | Judge Port directs that no one present at pre-trial motions held at this time may disclose contents of same. Court stands in recess |
|  | 4 PM Mr. Welch makes report of his findings in Chambers on statements and memorandum requested by defense. This case adjourned to 10 AM tomorrow |
|  | Mr. Welch moves for warrant to any U. S. Marshal, etc on deft John Doe, bail set at $25,000. |
|  | Issued warrant, etc. |
| ay 17 | Filed USC of Appeals notice-notice to file brief of Talerico before Aug 27, Manganelli appt counsel. |
| " | Filed USC of Appeals notice-notice to file brief of deft Zogby before Aug 27, Scholl appt counsel for Zogby |
|  | Filed USC of Appeals notice-notice to file brief of deft Mazza before Aug 27, Longeretta appt counsel for Mazza |
| y 16 | Trial continued |
| y 17 | Trial Continued. |
| " | Filed Government's Proposed Instructions |
| " | Filed Defendants Request to Charge |
| y 18 | Filed Deft. Marrone's Proposed Questions to Jurors |
| " | Filed Court Exhibits #1, 2, 3, 4 & 5. Court Exhibits 3501, 3502, 3503, 3504, 3505, 3506, 3507, 3508 and 3509. |
| " | Trial Continued. Deft. and Government sum up. Judge Port Charges Jury from 11:05 A. M. to 12:20 P. M. 12:22 P. M. Jury Retires to consider verdict. 1:07 P. M. to 2:15 P. M Jury goes to lunch. 2:15 P. M. Jury Resumes deliberation. The Jury at 3:50 P. M come into court and say they find the defendant Albert J. Marrone Guilty on Counts 1 & 7. Jury Polled, Unanimous Verdict indicated. Pre-Sentence Investigation Ordered and Motion for arrest of Judgment to be submitted within seven days or waived. No bail pending sentence. Defendant is remanded to custody of the Marshal and is to be returned to the custody of the Florida Officials after the time to make motion for arrest of Judgment expires. |
| y 21 | Filed CJA 21-deft Marrone ([illegible]) |
| y 23 | Filed appearance bond Delwright Dyman $2,500, 10% cash of $25,000. and bail form No. 2 |
| 24 | Filed Notice of motion for an order setting aside the jury verdict of May 18 of deft Marrone and dismissing counts one and seven of the Indictment as to deft. No return date |
| y 25 | The Court advised deft Louis Charles King Jr of his right to speak in his own behalf, defendant spoke, his attorney spoke. Defendant is sentenced to be confined in any institution designated by the Attorney General for a period of twenty years on each of counts one through seven, to run concurrently, and to pay a fine of $10,000 and stand committed until paid. Mr. Brindisi moves to waive the filing of fee for Notice of Appeal. Motion denied. Defendant is advised of his right to file Notice of Appeal. Remanded to custody of Marshal. LF MacM JS3 |
| 25 | Deft John Doe) Delwright Thomas Dyman) is arraigned and advised of his rights. Desires no atty. Defendant pleads not guilty. Motions made returnable in Utica June 25. served and filed by June 8, Govt reply by June 15. Bail continued. |

## PROCEEDINGS

| | |
|---|---|
| 27 | Filed CJA 21-cpy 5-for Marrone trial |
| y 14 | Filed petition and order to produce deft King May 24 at Utica at 9:30 AM |
| y 15 | Filed motion to suppress tape recorded conversations |
| | Filed supplemental memorandum of law |
| May 15 | Trial moved by U. S. Attorney. Jury drawn and sworn-sequestered. |
| | Court grants motion for motions to be heard without presence of press and public, in Judge's Chambers. |
| | Mr. Deery moves for non-public trial. Decision reserved until tomorrow |
| | Mr. Deery moves for suppression of evidence, and for production of certain statements made by FBI agents or Govt attys. Judge directs that Govt search their files to obtain such statements and produce same to Court for in camera inspection, to determine whether there is any exculpatory material and if so, same shall be given to defense counsel. |
| | Judge Port directs that no one present at pre-trial motions held at this time may disclose contents of same. Court stands in recess |
| | 4 PM Mr. Welch makes report of his findings in Chambers on statements and memorandum requested by defense. This case adjourned to 10 AM tomorrow |
| | Mr. Welch moves for warrant to any U. S. Marshal, etc on deft John Doe, bail set at $25,000. |
| | Issued warrant, etc. |
| May 17 | Filed USC of Appeals notice-notice to file brief of Talerico before Aug 27, Manganelli appt counsel. |
| | Filed USC of Appeals notice-notice to file brief of deft Zogby before Aug 27, Scholl appt counsel for Zogby |
| | Filed USC of Appeals notice-notice to file brief of deft Mazza before Aug 27, Longeretta appt counsel for Mazza |
| May 16 | Trial continued |
| May 17 | Trial Continued. |
| " " | Filed Government's Proposed Instructions |
| " " | Filed Defendants Request to Charge |
| May 18 | Filed Deft. Marrone's Proposed Questions to Jurors |
| " " | Filed Court Exhibits #1, 2, 3, 4 & 5. Court Exhibits 3501, 3502, 3503, 3504, 3505, 3506, 3507, 3508 and 3509. |
| " " | Trial Continued. Deft. and Government sum up. Judge Port Charges Jury from 11:05 A. M. to 12:20 P. M. 12:22 P. M. Jury Retires to consider verdict. 1:07 P. M. to 2:15 P. Jury goes to lunch. 2:15 P. M. Jury Resumes deliberation. The Jury at 3:50 P. M come into court and say they find the defendant Albert J. Marrone Guilty on Counts 1 & 7. Jury Polled, Unanimous Verdict indicated. Pre-Sentence Investigation Ordered and Motion for arrest of Judgment to be submitted within seven days or waived. No bail pending sentence. Defendant is remanded to custody of the Marshal and is to be returned to the custody of the Florida Officials after the time to make motion for arrest of Judgment expires. |
| May 21 | Filed CJA 21-deft Marrone |
| May 23 | Filed appearance bond Delwright Dyman $2,500, 10% cash of $25,000. and bail form No. 2 |
| May 24 | Filed Notice of motion for an order setting aside the jury verdict of May 18 of deft Marrone and dismissing counts one and seven of the Indictment as to deft. No return dat |
| May 25 | The Court advised deft Louis Charles King Jr of his right to speak in his own behalf, defendant spoke, his attorney spoke. Defendant is sentenced to be confined in any institution designated by the Attorney General for a period of twenty years on each of counts one through seven, to run concurrently, and to pay a fine of $10,000 and stand committed until paid. Mr. Brindisi moves to waive the filing of fee for Notice of Appeal. Motion denied. Defendant is advised of his right to file Notice of Appeal. Remanded to custody of Marshal. LF MacM JS3 |
| May 25 | Deft John Doe (Delwright Thomas Dyman) is arraigned and advised of his rights. Desires no atty. Defendant pleads not guilty. Motions made returnable in Utica June 25. served and filed by June 8, Govt reply by June 15. Bail continued. |

May

[illegible]

Court grants motion for motions to [illegible] without [illegible] in Judge's Chambers.

Mr. [illegible] moves for non-public trial. Decision reserved until [illegible]

Mr. [illegible] moves for suppression of evidence, and for production of [illegible] made by FBI agents or Govt attys. Judge directs that Govt search their [illegible] such statements and produce same to Court for in camera inspection. [illegible] there is any exculpatory material and if so, same shall be given to defense [illegible]

Judge Port directs that no one present at pre-trial motions held at this [illegible] disclose contents of same. Court stands in recess

4 PM Mr. Welch makes report of his findings in Chambers on [illegible] requested by defense. This case adjourned to 10 AM tomorrow

Mr. Welch moves for warrant to any U. S. Marshal, etc on deft John Doe, bail [illegible] $25,000.

Issued warrant, etc.

[illegible] Filed USC of Appeals notice-notice to file brief of [illegible]erico before Aug 27, [illegible] appt counsel.

Filed USC of Appeals notice-notice to file brief of deft Zogby before Aug 27, [illegible] counsel for Zogby

Filed USC of Appeals notice-notice to file brief of deft Mazza before Aug 27, [illegible] appt counsel for Mazza

16 Trial continued

17 Trial Continued.

" Filed Government's Proposed Instructions

" Filed Defendants Request to Charge

18 Filed Deft. Marrone's Proposed Questions to Jurors

" Filed Court Exhibits #1, 2, 3, 4 & 5. Court Exhibits 3501, 3502, 3503, 3504, 3505, 3506, 3507, 3508 and 3509.

" Trial Continued. Deft. and Government sum up. Judge Port Charges Jury from 11:05 A. M. to 12:20 P. M. 12:22 P. M. Jury Retires to consider verdict. 1:07 P. M. to 2:15 P. M. Jury goes to lunch. 2:15 P. M. Jury Resumes deliberation. The Jury at 3:50 P. M come into court and say they find the defendant Albert J. Marrone Guilty on Counts 1 & 7. Jury Polled, Unanimous Verdict indicated. Pre-Sentence Investigation Ordered and Motion for arrest of Judgment to be submitted within seven days or waived. No bail pending sentence. Defendant is remanded to custody of the Marshal and is to be returned to the custody of the Florida Officials after the time to make motion for arrest of Judgment expires.

21 Filed CJA 21-deft Marrone

23 Filed appearance bond Delwright Lyman $2,500, 10% each of $25,000. and bail form No. 2

24 Filed Notice of motion for an order setting aside the jury verdict of May 18 of deft Marrone and dismissing counts one and seven of the Indictment as to deft. No return date

25 The Court advised deft Louis Charles King Jr of his right to speak in his own behalf, defendant spoke, his attorney spoke. Defendant is sentenced to be confined in any institution designated by the Attorney General for a period of twenty years on each of counts one through seven, to run concurrently, and to pay a fine of $10,000 and stand committed until paid. Mr. Brindisi moves to waive the filing of fee for Notice of Appeal. Motion denied. Defendant is advised of his right to file Notice of Appeal. Remanded to custody of Marshal. [illegible] JSS

~~May~~ 25 Deft John Doe)Delwright Thomas Lyman) is arraigned and advised of his rights. Desires no atty. Defendant pleads not guilty. Motions made returnable in Utica [illegible] June 25. served and filed by June 8, Govt reply by June 15. Bail continued.

| DATE<br>1973 | PROCEEDINGS |
|---|---|
| May 25 | Filed Notice of Appeal-King-copy US Ct of Appeals with copy of docket sheets |
| May 23 | Motion for reduction of bail of deft Dyman-bail is to stay at $25000, 10% of bail, $2500 posted, deft is not to leave NDNY |
| May 23 | Filed notice of motion and supporting affidavit of deft Dyman for reduction of bail |
| May 29 | Filed warrant-Dyman-ex May 17, 1973,com temp commitment |
| June 1 | Filed Judgment-King-2 copies Marshal's office-1 cpy Judg[illegible]ish,County Oneida |
| June 5 | Filed Memorandum in Response to Defendant Marrone's Moti[illegible]o Set Aside Verdict or new trial |
| June 5 | Mr. Deery moves to set aside jury verdict of deft Marrone on grounds stated, or alternatively to have a new trial. Motion denied in entirety |
|  | Mr. Deery moves for deft to be released on bail. Motion denied. |
|  | Deft remanded to custody of Marshal. |
| June 8 | Filed order of Judge MacMahon to produce deft King |
| June 12 | Filed Commitment - King-ex May 29, 1973 Med.Center for Fed. Prisoners, Springfield, Missouri |
| June 18 | Filed Memorandum of Judge MacMahon-for atty Scholl |
| June 18 | Filed affidavit of atty Scholl-3 for expenses |
| June 19 | Filed letter of atty Manganelli stating that he is appt for deft Talerico for appeal at 2nd Circuit, by Judge Friendly. |
| June 19 | Sent Certified Copy of Record on Appeal to CCA, 2nd Circuit |
| June 21 | Filed recpt of papers |
| Feb 22 | Filed order for buss service for sequestered jury in Utica, February, 1973 |
| June 27 | Filed motion for leave to appeal-~~Marrone~~ King |
|  | Filed affidavit " |
| July 6 | Filed CJA 21-cpy 5-Marrone |
| July 9 | Filed endorsement of Judge MacMahon denying motion to appeal in present form |
| July 6 | The Court advised deft Marrone of his right to speak in his own behalf, defendant declined, his attorney spoke. Defendant is sentenced on count one to be confined in any institution designated by the Attorn ey General for a period of seven years. Defendant is sentenced on count seven to be confined in any institution designated by the Attorney General for a period of seven years, this sentence to run concurrently with the sentence on count one. Defendant is given his right to appeal. Remanded to custody of Marshal. Bail is denied until appeal. May continued in Forma pauperis. EP JS3 |
| July 9 | Filed financial affidavit-Dyman |
| July 9 | Motions for Dyman returnable Sept 10 at Syracuse, papers filed on or before Aug 20, answers on or before Aug 27, copies to Judge Port |
| July 11 | Filed Notice of Appeal-Marrone-sent copy to USC A with copy of docket sheet & copy to USA |
| July 12 | Filed Judgment-Marrone-2 copies Marshal's office |
| July 13 | Filed Govt's notice of readiness for trial of deft Dyman |
| July 12 | Filed CJA 20 cpy [illegible]-for Dyman |
| July 17 | Filed CJA Form 20 cpy 2-Zogby |
| July 18 | Filed transcript of trial commencing Feb 20, 1973-Utica pgs 1-654 |
|  | Filed transcript of trial cont Feb 26, 1973-Utica pgs 655-1115 |
| July 19 | Defendant Talerico appears with attorney in open court for re-sentencing. The Court advised the defendant of his right to speak in his own behalf, defendant spoke, his attorney spoke. Defendant is sentenced to be confined in any institution designated by the Attorney General for a period of seven years on count four and seven years on count seven, to run concurrently with each other. This sentence is imposed pursuant to T18 USC Sec 4208(a)(2). Remanded to ; custody of Marshal. LFMac M JS3 |
| July 24 | Filed CJA 21 cpy 2 & 5-Zogby-for transcript |
| July 24 | Sent Notice of appeal, transcript, supplemental index to USC A-Marrone |
| July 27 | Filed Receipt of papers sent to CCA |
| July 30 | Filed order indicating that record on appeal must be filed before 8/13/73 |

| DATE | PROCEEDINGS |
|---|---|
| July 27 | Filed order of CCA extending time to file brief and appendix to 9/25/73 |
| July 30 | Filed Judgment-Talerico-2 copies Marshal's office |
| Aug. 9 | Filed ~~Index of Witnesses~~ Transcript of sentencing of July 19, 1973 of Taleri |
| Aug. 13 | Filed CJA Form 21, Copy 5 transcript Carl J. Mazza |
| Aug. 6 | Filed Financial Affidavit, Carl J. Mazza |
| Aug. 16 | Filed CJA Form 21 Copy 2, Carl J. Mazza |
| Aug 21 | Filed Notice of Motion for Sept 10, Syracuse, for hearing-Dyman |
| ~~Aug 29~~ | ~~Filed deft King's motion for leave to appeal in forma pauperis~~ |
| Sept 7 | Filed Govt's response to deft Dyman's motion for hearing and separate trials |
| Sept 10 | Motion withdrawn to sever. Request for hearing to be set before trial. 3 days noti in advance of trial |
| Sept 12 | Filed CJA 21-payment for transcript |
| | Filed letter of Mrs. Mazza to Judge MacMahon, and Judge MacMahon's note |
| Sept 17 | Filed motion for notice of alibi ? |
| Sept 18 | Suppression hearing-Judge Port directs that no one shall be present at this time except for the witness and attorneys and Court personnel. Deft Dyman gives up his right for this proceeding. Evidence is closed and decision is reserved. |
| Sept 18 | Filed order for deft's attorney to subpoena witnesses |
| Sept 19 | Filed Memorandum of law of Govt |
| Sept 19 | Trial moved by U. S. Attorney-jury drawn and sworn- Motion to suppress is denied |
| Sept 20 | Filed stipulation signed by both sides that the jurors are to listen to only parts of tapes that were given in former trial. |
| Sept 21 | Filed Govt's proposed instructions |
| Sept 24 | Filed Deft's request to charge |
| Sept 20 | Trial continued |
| Sept 21 | Trial continued |
| Sept 24 | Filed exhibits #1,2-Court |
| Sept 25 | Filed CJA 21 cpy 5,2 |
| Sept 24 | Trial continued. Mr. Wineburg moves for judgment of acquittal on facts stated. Deni |
| | Mr. Wineburg sums up for defendant |
| | Mr. Welch sums up for Govt |
| | Judge Port charges the jury at 11:52 AM, and they retire at 1:14 PM in charge of two sworn officers, to consider their verdict. |
| | The Jury, at 6:30 PM come in to Court and say they find the defendant Guilty on counts two and seven of the Indictment. Mr. Welch moves to commit the defendant Motion granted. Defendant is remanded to custody of Marshal. Pre-sentence ordered. Sentence deferred. |
| | Mr. Wineburg moves to set aside the verdict on grounds stated. Denied. |
| July 24 | Filed financial aff -Talerico |
| | Filed financial aff-Talerico |
| Aug 1 | Filed financial aff-Mazza |
| Oct 3 | Filed deft ex A |
| | Filed Govt ex #2,3 |
| Oct 4 | Filed transcript of deft Marrone of May 15, 1973 trial |
| Oct 9 | Filed Memorandum-Order of Judge Port as to fair charges of Deery for deft Marrone |
| | Filed affidavit of Joseph Deery, Jr as to deft Marrone |
| | Filed letter of Deery to Judge Port, and Judge Port's reply |
| Oct. 15 | Filed transcript of proceedings before Judge Foley on 12/19/72 |
| Oct 16 | Filed Notice of Appeal-deft Dyman-copy USCA with copy of docket sheets, copy USAtty |
| Oct 16 | Filed CJA 21-cpy 2-Marrone |
| Oct 17 | Sent Notice of appeal and copy of docket sheets to USCA |
| Oct 17 | Filed criminal case information Form A-Dyman |
| ~~Jan 7 1975~~ | ~~Sent Certified copy of Record on Appeal to CCA, 2nd Cir.~~ |

| DATE | PROCEEDINGS |
|---|---|
| Oct 15 | The Court advised deft Dyman of .his right to speak in his own behalf, defendant spoke, his attorney spoke. Defendant is s entenced to be confined in any institution designated by the Attorney General for a period of ten years on count two. Defendant is sentenced on count seven to be confined in any institution designated by the Attorney General for a period of ten years, to run concurrently with the sentence on count two. Defendant is advised of his right to appeal. Remanded to custody of Marshal. Mr. Wineburg moves for bail until appeal. Bail denied. EP JS3 |
| Oct 17 | Filed CJA 21 cpy 5-Dyman |
| Oct 24 | Filed Petitionand order for return of cash bail-Dyman |
| ~~Oct 29~~ | ~~Filed writ,ex Oct 2,1973~~ |
| Nov 1 | Filed order for record to be transmitted and time to file briefs-Dyman . |
| Nov 1 | Filed Judgment-2 copies Marshal's office -Dyman |
| " 5 | Sent Certified Copy of Record on Appeal to CCA, 2nd Cir. Dyman |
| Nov 7 | Filed copy of Memorandum, order of Judge Port certifying that reimbursement to Atty Michael Wineburg is justifiable |
|  | Filed affidavit in support of application for fees in excess of $1,000-Wineburg, for deft Dyman |
| Nov 8 | Filed receipt of papers-Dyman of CCA |
| Nov 26 | Filed Judgment-Dyman-ex Nov 15, 1973,US Pen, Lewisburg, Pa |
| Nov 26 | Filed CJA 20 cpy 2-Marrone |
| Nov 29 | Filed affidavit of atty Wineburg, for deft Dyman |
|  | Filed Judge Port's order for expenses of Wineburg |
|  | Filed CJA 20 cpy 2-Dyman |
| Dec 5 | Filed petition and order for return of cash bail-Zogby |
| Dec 20 | Filed CJA 20 cpy 5-Marrone |
| Dec 31 | Filed Court of Appeals affirming judgment as toidefts King, Talerico,Zogby, Mazza, Marrone. |
| 1974 |  |
| Jan 3 | Filed transcript of trial of Sept 17, 1973 |
| Jan 10 | Filed CJA 21 cpy 2-Byman |
| Feb. 19 | Filed Decision from C.C.A. |
| Mar 22 | Filed Order to show cause for reduction of sentence of Marrone, and aff of mail servic |
| Apr. 1 | Filed Court of Appeals affirming Judgment as to deft. D. Dyman |
| April 12 | Filed sealed envelope signed by Hon. E. Port. |
| April 12 | Filed Order and Amended Judgment - Albert J. Marrone 2 copies Marshal 1 copy Probation |
| May 20 | Filed Supreme Ct judgment denying writ of certiorari-King |
|  | Filed Supreme Ct judgment denying writ of certiorari-Zogby |
| July 5 | Filed ~~transcript~~ letter from deft Zogby requesting reduction of sentence and Judge MacMahon's endorsement denying same |
| July 30 | Filed letter of deft Zogby's daughter and endorsement of Judge MacMahon |
|  | Filed letter of Mrs Zogby and Judge MacMahon's endorsement |
| Aug 19 | Filed copy of letter to Judge MacMahon-motion for reduction of sentence, and 3 testimonial letters |
| 9/9/74 | Filed Certificated of Service of Notice of Motion for reduction of sentence - Louis Charles King |
| 9/16/74 | Filed Motion for reduction of sentence on behalf of Deft. King by Attorney Riccio, and endorsement thereon by Judge MacMahon dated September 12, 1974 denying same. |
| 9/16 | Filed letter dated August 9, 1974 from Mrs. Sharon Mazza with endorsement of Judge MacMahon dated 9/12/74 thereon reading "contents noted" |
| 9/16 | Filed letter dated 8/23/74 from C. J. Mazza treated by Judge MacMahon as a motion for the reduction of sentence and endorsement of Judge MacMahon attached thereto dated 9/12/74 denying the motion for reduct. |

| DATE | PROCEEDINGS |
|---|---|
| 9/16/74 | Filed letter dated 8/13/74 from Marie Orcolo with endorsement of Judge MacMahon thereon dated 9/12/74 of "contents noted". |
| 9/16/74 | Filed letter dated 8/14/74 from Angelo LoConti and endorsement of Judge MacMahon thereon dated 9/12/74 of "contents noted" |
| 9/16/74 | Filed letter dated 8/15/74 from Br. Richard Mazza, CFX and endorsement of Judge MacMahon thereon dated 9/12/74 of "contents noted". |
| 9/16/74 | Filled letter dated 8/14/74 from Angelo F. Amodio, County legislature and endorsement of Judge MacMahon dated 9/12/74 of "contents noted". |
| 9/16/74 | Filed undated letter from Rose Mazza with endorsement of Judge MacMahon thereon dated 9/12/74 of "contents noted" |
| 9/16/74 | Filed letter from Louis King dated Aug. 16, 1974 and endorsement of Judge MacMahon thereon dated 9/12/74 of "contents noted". |
| 9/16/74 | Filed letter from Mrs. Adele M. Jones dated 8/16/74 with endorsement of Judge MacMahon thereon dated 9/12/74 of "contents noted" |
| 9/16/74 | Filed letter of Mrs. Jack Zogby dated 8/27/74 with endorsement of Judge MacMahon thereon dated 9/12/74 of "contents noted. |
| 9/16/74 | Filed letter of 8/15/74 from Mrs. Dominic Pitrel (Theresa Talerico) with endorsement of Judge MacMahon thereon dated 9/12/74 of "contents noted". |
| 9/16/74 | Filed letter undated from Mrs. James V. Talerico with endorsement of Judge MacMahon thereon dated 9/12/74 of "contents noted" |
| 9/16/74 | Filed letter of Sharon Mazza enclosing 15 pages of signatures supportin a reduction of sentence of Carl Mazza with endorsement of Judge MacMahon thereon dated 9/12/74 of "contents noted." |
| 9/16/74 | Filed letter dated 8/31/74 of James Talerico and endorsement of Judge MacMahon treating the letter as a motion for the reduction of sentence and denying same under date of 9/12/74. |
| 11/8/74 | Filed Order of the Supreme Court denying petition for Writ of Certiorari re: Delwright T. Dyman |
| 11/25 | Filed letter for reduction of sentence with Order denying same, signed by Judge Port. |
| 12/4/74 | Filed Notice of Appeal - Delwright Dyman |
| Jan. 7 1975 | Sent Certified copy of Record on Appeal to CCA, 2nd Cir. Dyman |
| 1/14/75 | Filed receipt for papers sent to C.C.A. re Dyman |
| 2/4/75 | Filed letter from Delwright T. Dyman for reduction of sentence and Order that same be denied by Judge Port. |
| 2/12/75 | Filed Copy of Application sent to U.S.C.A. - re Delwright Dyman |
| 2/27/75 | Filed letter from Jack Zogby treated as a petition for the reduction of sentendce with following endorsement by Hon. Lloyd F. MacMahon on same "Treating this letter as a motion to reduce sentence pursuant to Rule 35, Fed. Rules Crim. Procedure the motion is in all respects denied." |
| 3/3/75 | Filed Parole Form H-7, Notice of Action re Albert J. Marrone |
| 3/31/75 | Filed Order from Circuit Court of Appeals denying motion of Delwiright Dyman to proceed in forma pauperis and for reduction of sentence and dismissing appeal. |
| 4/9/75<br>5/22/75 | All papers received from the Circuit Couft of Appeals. |
| 5/28/75 | Filed Addendum to Motion to Vacate Sentence - Delwright Dyman |
| 9/11/75 | Filed Memorandum of Judge MacMahon denying application for post-conviction relief. for King, Mazza, Talerico & Zogby 75C1172 |
| 10/16/75 | Filed letter from Louis Brindisi with following endorsement by Judge MacMahon "10/9/75-Contents noted, LFM., U.S.D.J." |
| 2/11/76 | Filed Parole Form H-7(a) re James Vincent Talerico, Parole effective April 7, 1976 to an approved plan. |

| .TE | PROCEEDINGS |
|---|---|
| ay 19, 1976 | Filed U.S. DEPT. OF JUSTICE Parole Form H-7-Carl Mazza-<br>Parole effective June 22, 1976. |
| 10/1/76 | Received all papers from C.C.A., and Supplemental index |
| 1977 | |
| Jan. 7 | Filed Motion to Vacate Judgment and Sentence pursuant to T28 U.S.C. Section 2255. |
| Jan. 7 | Filed Petitioner's Appendix (Volume I) |
| Jan. 7 | Filed Petitioner's Appendix (Volume II) |
| 1/18/77 | Filed Memorandum of HON. L. F. MacMahon. |
| 1/18/77 | Copy of 2255 Application with appendices forwarded to U. S. Attorney Syracuse. |
| 1/20/77 | Transcripts of proceedings (4) in safe in Utica. |
| 2/1/77 | Filed Motion and Notice of Motion returnable 2/11/77 to extend time until 3/31/77 to respond to petitioner's claims. |
| 2/9/77 | Filed Return receipt for copies of Judge MacMahon's opinion, Sent to Attorney for Petitioner, Henry J. Boitel. |
| 2/9/77 | Filed letter to Clerk from Atty. Boitel consenting to Gov't. Motion for extension of time to respond to 2255 application to March 21, 1977. |
| 2/10/77 | Filed endorsement of Judge MacMahon on Notice of Motion as follows: "Feb. 10, 1977 - Upon consent of the attorney for petitioner, the within motion is granted to the extent that the Government's time for filing its answer or moving with respect to the petition is exten until March 21, 1977. So Ordered. Lloyd F. MacMahon, USDJ." |
| 2/25/77 | Filed Order and Affidavit signed 2/25/77 by Judge MacMahon ordering payment by U.S. of $114.95 to M. Frank Sack or to John C. Scholl. |
| 3/21/77 | Filed Government's Memorandum in opposition to motion to vacate judgmer and sentence filed by Petitioner, Louis Charles King, on January 1,197 Sealed per Order of Judge MacMahon dated Jan. 13,1977. |
| 4/4/77 | Filed Reply Memorandum in behalf of Petitioner Louis King, and Affirmation of Service by Attorney Henry J. Boitel., sealed per order of Judge MacMahon dated Jan. 13, 1977. |
| 7/29/77 | Filed Opinion signed by Hon. Lloyd F. MacMahon. |
| 8/8/77 | Filed Notice of Appeal by attorney Boitel, and Certificate of service. |
| 9/19/77 | Filed Civil Appeal, Scheduling Order |

10 a

**CRIMINAL DOCKET**
**UNITED STATES DISTRICT COURT** 73-CR 94

D. C. Form No. 100 Rev.

| TITLE OF CASE | ATTORNEYS |
|---|---|
| CLOSED THE UNITED STATES | *For U. S.:* |
| *vs.* | James M. Sullivan, Jr. |
| | Welch |
| | DiBianco |
| LOUIS CHARLES KING JR | |
| | *For Defendant:* |
| | Louis Brindisi |
| | 702 Bleecker Utica |
| | James F. Morrissey, assgd |
| | 310 Hills Bldg, Syr 472-6231 |

| STATISTICAL RECORD | COSTS | | DATE | NAME OR RECEIPT NO. | REC. | DISB. |
|---|---|---|---|---|---|---|
| J.S. 2 mailed | Clerk | | | | | |
| J.S. 3 mailed | Marshal | | | | | |
| Violation | Docket fee | | | | | |
| Title | | | | | | |
| Sec. | | | | | | |

| DATE 1973 | PROCEEDINGS |
|---|---|
| May 8 | Filed Indictment-26:5861(d),5871-possessing hand grenade no registered, 18:1503-by force endeavoring to influence officerof US with respect to charges against him in criminal matter,18:844(h)-using hand grenade to commit offense of obstructing justice 4 cts JS2 |
| May 25 | Defendant is arraigned and pleads not guilty. Motions made returnable June 25 at Utica, filed on or before June 8, Govt reply on or before June 15. Bail is denied. Remanded to custody of Marshal. |
| Aug 1 | Filed Govt's readiness for trial |
| Aug 30 | Filed affidavit of atty Brindisi asking for Court to appt him counsel for deft |
| Sept 11 | Filed CJA form 20 |
| Sept 19 | Filed copy of letter of Asst Atty to Morrissey, concerning medical report |
| Sept 26 | Filed Petition and order for writ |
| | Issued writ, etc |
| Oct 2 | Mr. Morrissey moves to put case on Albany Session. Motion granted. Directed to put case on Albany for Nov 8, first case at Albany |
| Oct 4 | Filed transcript of May 25 |
| Oct 29 | Filed writ, of Oct 2, 1973 |
| Nov 14 | Filed petition and order for writ |
| | Issued writ, Albany, NY for trial |
| Nov 19 | Defendant withdraws plea of not guilty and pleads guilty to count one. (over) |

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| DATE | PROCEEDINGS |
|---|---|
|  | Presentedce investigation ordered. Sentence deferred. Remanded to custody of Marshal |
| ~~Nov 30~~ | ~~The Court advised the defendant of his right to speak in his own behalf, defendant spoke, his attorney spoke. Defendant is sentenced to be confined in any institution designated by the Attorney General for a period of five years, to run concurrently with the twenty year sentence imposed on May 25, 1973 on 73CR9, on count one. Counts two, three and four are dismissed on motion of G. J. DiBianco, Asst US Atty. Remanded to custody of Marshal. JTF JS3~~ |
| Dec 5 | Filed Judgment-2 copies Marshal's office |
| Dec 6 | Filed Commitment ex Dec 6, Lewisburg |
| Nov 30 | The Court advised the defendant of his right to speak in his own behalf, defendant spoke, his attorney spoke. Defendant is sentenced to be confined in any institution designated by the Attorney General for a period of five years, to run consecutive to sentence imposed on May 25, 1973 on 73CR9, 20 yearsconcurrenty on seven counts. Defendant shall become eligible for parole as the Board of Parole shall determine. 28 USC 5871. Counts 2,3,4 are dismissed, on motion of G. J. DiBianco, Asst US Atty. Remanded to custody of Marshal. JTF JS3 |
| 7/16/75 | Filed Motion for Reduction of Sentence and Order of Judge Foley denying same. |

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK AT UTICA

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| | | |
|---|---|---|
| LOUIS CHARLES KING, | : | Civ. Action No.: ______<br>(Related Criminal<br>Docket No. 73 Cr. 9) |
| Petitioner, | : | |
| vs. | : | |
| UNITED STATES OF AMERICA, | : | |
| Respondent. | : | |

-----------------------------------X

## MOTION TO VACATE JUDGMENT AND SENTENCE AND FOR OTHER RELIEF INCIDENTAL THERETO

### TABLE OF CONTENTS

Page

I. Jurisdiction .................................. 1

II. Relief Sought ............................. 2

  A. Ultimate Relief ......................... 2

  B. Interim Relief .......................... 2

    1. Recusal or Disqualification of Trial Judge ........................ 3

    2. Evidentiary Hearing ................ 3

    3. Disclosure .......................... 5

    4. Alternative Relief in Aid of Motion: Deposition of Certain Witnesses ....... 5

  C. Protection of Integrity of Proceedings ..... 6

  D. Declaration of No Prior Collateral Application ............................ 6

III. Jurisdictional Statement .................. 7

## TABLE OF CONTENTS

Page

IV. Documents Submitted in Support of this Motion and in Support of the Interim Relief Requested .......................... 7

A. Documents Annexed Hereto .............. 7

B. Documents Not Annexed to This Motion ... 7

V. Statement of Facts .......................... 8

A. Events Prior to the Shooting of Petitioner .......................... 8

B. The Shooting Incident ................. 11

C. The Appeal ........................... 21

D. The April 9, 1975 Petition for Relief, Pursuant to 28 U.S.C. § 2255 and F.R.Cr.P. Rule 33 ............................. 22

E. Facts Showing that Petitioner was not Properly a Party to the May 16, 1975 Application for Collateral Relief, and that He Should not be Bound by the Court's Determination of that Application. 24

F. The Evidence Upon Which the Instant Petition is Predicated ................ 28

1. Background Provided by the Existing Record ............................ 28

2. The Executed Statement of a Juror ... 30

3. The Oral Statements of Ronald Wakeel and the Directive that he not Execute an Affidavit ...................... 32

VI. Facts Concerning the Excessively Deadly Force to Which Petitioner was Subjected and Which Prevented Him From Attending at the Trial ............................ 37

VII. Legal Basis for Vacating the Sentence and Granting the Other Items of Requested Relief. 38

## TABLE OF CONTENTS

Page

POINT ONE: If the jurors were, in fact, exposed to publicity concerning the shooting incident in which petitioner was involved, then petitioner was deprived of a fair trial and he is entitled to vacation of the sentence and judgment ........................ 38

A. Exposure of jurors to Extra-judicial Information Concerning a Defendant is Presumptively Prejudicial and Affiramtive Proof of Harmlessness is Required to Overcome that Presumption ............ 41

B. An Evidentiary Hearing is Required Where Facts are Shown Which Indicate that One or More Jurors May Have Been Exposed to Prejudicial Publicity ............................ 42

POINT TWO: The unsworn statements of Mr. Wakeel properly provide a basis for an evidentiary hearing or, alternatively, for an order directing Mr. Wakeel to submit to a deposition .............. 45

POINT THREE: The trial juror who has given a statement, as well as the other trial jurors, may properly testify with respect to any extra-judicial information which was conveyed to them concerning the petitioner during the course of their sequestration ................. 48

POINT FOUR: In the event that this Court should determine that the available evidence does not justify a hearing, then this Court should order that the relevant witnesses submit to depositions ............................ 51

POINT FIVE: The Court should direct the government to provide petitioner, in advance of the hearing, and in aid of the instant motion, all memoranda in

TABLE OF CONTENTS

Page

its possession concerning the shooting incident and concerning the exposure of the jury to extra-judicial information concerning petitioner ........... 52

POINT SIX: Pending an evidentiary hearing, this Court should protect the integrity of these proceedings by directing that the parties and Court personnel not disseminate the contents of this petition or the contents of the government's response to the public or the press .... 53

POINT SEVEN: The prior application for relief, pursuant to 28 U.S.C. § 2255, does not foreclose consideration of the instant petition ............................ 54

POINT EIGHT: The issues raised by this petition have not been previously adjudicated on direct appeal ........... 55

POINT NINE: Due to the excessive use of deadly force by the law enforcement officers who apprehended him, petitioner was unable to attend at his trial and, therefore, was deprived of his Sixth Amendment right to confront and cross-examine the witnesses against him ......................... 55

POINT TEN: Pursuant to 28 U.S.C. §§ 144 & 145, the Honorable Lloyd F. MacMahon is disqualified from further participation, as a judicial officer, in these proceedings, and this petition should be assigned to a different district judge ................................ 58

Conclusion ................................. 64

# TABLE OF CONTENTS

Page

Documents Filed in Support of and Annexed to Petition.

Affidavit of Counsel

Affidavit of Petitioner

Affidavit of Disqualification

Certificate of Counsel

## TABLE OF AUTHORITIES

Cases: Page

Action Realty Co. v. Will, 427 F. 2d 843 (7th Cir., 1970) .......................... 58, 60

Argo v. United States, 473 F. 2d 1315 (9th Cir., 1973) .............................. 52

Baker v. Hudspeth, 129 F. 2d 779 (10th Cir., 1942) ............................ 25

Berger v. United States, 255 U.S. 22 (1922) ........ 58, 59

Gafford v. Warden, 434 F. 2d 318 (10th Cir., 1970) ........................... 42

Government of Virgin Islands v. Gereau, 523 F. 2d 140 (3rd Cir., 1975) ................. 50

Harris v. Nelson, 394 U.S. 286, reh. den., 394 U.S. 1025 (1969) ............................ 51-2

Marchibroda v. United States, 368 U.S. 491 (1962) .. 43

Mattox v. United States, 146 U.S. 140 (1892) ....... 50

Parker v. Gladden, 385 U.S. 363 (1966) ............. 41

Patterson v. Colorado, 204 U.S. 454 (1907) ......... 41

People v. DeLucia, 20 N.Y. 2d 275, 282 N.Y.S. 2d 526 (1967) ................................ 46

Remmer v. United States, 347 U.S. 227 (1953) ....... 41-2

Rosen v. Sugarman, 357 F. 2d 794 (2d Cir., 1966) ............................. 59

United States v. Brasco, 516 F. 2d 816 (2d Cir., 1975) ................................. 42

United States v. Eagle, 539 F. 2d 1166 (8th Cir., 1976) ............................ 46

United States v. Guthrie, 387 F. 2d 569 (4th Cir., 1967) ............................. 41

Page

United States v. King, 486 F. 2d 1397, cert. den., 466 U.S. 958 (2d Cir., 1974) ...... 21

United States v. McKinney, 429 F. 2d 1019 (5th Cir., 1970) .............................. 47-8

United States v. Roca-Alvarez, 451 F. 2d 843 (5th Cir., 1971) .............................. 58-9

United States v. Thomas, 463 F. 2d 1061 (7th Cir., 1972) .............................. 42

United States v. Valenciano, 495 F. 2d 585 (3d Cir., 1974) .............................. 42-3

United States v. Wilson, 534 F. 2d 375 (D.C.Cir., 1976) .............................. 50

United States ex rel. Owen v. McMann, 435 F. 2d 813 (2d Cir., 1970), cert. den., 402 U.S. 906 (1971) .................................. 50

United States ex rel. Tobe v. Bensinger, 492 F. 2d 232 (7th Cir., 1974) .............. 41

United States v. Womack, 454 F. 2d 1337 (5th Cir., 1972) .............................. 59

Wagner v. United States 418 F. 2d 1315 (9th Cir., 1973) .............................. 52

Wolfson v. Palmieri, 396 F. 2d 121 (2d Cir., 1968) .............................. 59

United States Code:

18 U.S.C. § 891 10
18 U.S.C. § 892 8
18 U.S.C. & 893 8
18 U.S.C. § 894 8
28 U.S.C. § 144 3, 58
28 U.S.C. § 455 3, 62-3
28 U.S.C. § 2255 1, passim

Federal Rules of Criminal Procedure:

Rule 33 22

Federal Rules of Evidence:

Rule 606(b) 48-9

Page

Other Authorities:

Advisory Committee Notes, Federal Rules of Evidence .................................. 49

A B A Project on Minimum Standards for Criminal Justice - Trial by Jury, § 5.7 ...... 46

New York Penal Law § 35.30 56

Proceedings of Special Subcommittee on Reform of Federal Criminal Laws of the Committee on the Judiciary of the House of Representatives, 93rd Congress, 1st Sess. .............. 49

Weinstein's Evidence .......................... 49

18

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK AT UTICA

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| | | |
|---|---|---|
| LOUIS CHARLES KING, | : | Civ. Action No.:________<br>(Related Criminal<br>Docket No. 73 Cr. 9) |
| Petitioner, | : | |
| vs. | : | |
| UNITED STATES OF AMERICA, | : | |
| Respondent. | : | |

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## MOTION TO VACATE JUDGMENT AND SENTENCE AND FOR OTHER RELIEF INCIDENTAL THERETO

Louis Charles King prays that this Court vacate the sentence imposed upon him on May 25, 1973, pursuant to a judgment of conviction entered against him in the United States District Court for the Northern District of New York at Utica, under Criminal Docket No. 73 Cr. 9.

### I. JURISDICTION.

Jurisdiction for the relief sought is grounded in 28 U.S.C. § 2255, upon the grounds that:

A. The sentence was procured and entered in violation of petitioner's rights under the Fifth and Sixth Amendments of the United States Constitution, to wit: his rights to due process of law, an impartial jury, and confrontation of the witnesses against him. The factual basis for this ground, as hereinafter amplified, is as follows: in the midst of trial, and while under a Court order of sequestration, some or all of the trial jurors were actually, but extra-judicially, informed of manifestly prejudicial information concerning petitioner as a result of public allegations that, during the trial, petitioner was involved in a "shoot-out" with law enforcement officers with respect to petitioner's alleged effort to bomb the home of a Federal agent who was a participant in the prosecution of petitioner.

B. The sentence was procured and entered in violation of petitioner's rights under the Fifth and Sixth Amendments of the United States Constitution, to wit: petitioner's rights to due process of law and confrontation of the witnesses against him. The factual basis for this ground of the motion, as more fully set forth hereinafter, is that, in the midst of trial, petitioner was wrongfully and unnecessarily subjected to serious physical injury by virtue of acts of agents of the Federal Bureau of Investigation, thereby making it impossible for petitioner to continue to attend at his own trial.

## II. RELIEF SOUGHT.

### A. Ultimate Relief.

Petitioner moves the Court to vacate the judgment of conviction and sentence entered against petitioner before the Honorable Lloyd F. MacMahon, on May 25, 1973, after a jury trial of Indictment No. 73 Cr. 9.

### B. Interim Relief.

In aid of this motion that the aforesaid judgment of conviction and sentence be vacated, petitioner seeks the following interim relief, without which there cannot be a full and fair determination of his motion:

1. Recusal or disqualification of trial judge. Recusation or disqualification of the Honorable Lloyd F. MacMahon from further participation in these proceedings in his capacity as a District Judge, upon the ground that his relationship to this case, his ex parte conferences with potential witnesses, and his own status as a witness, require the designation of a different District Judge to hearand determine the factual and legal issues with respect to the instant motion. This preliminary relief is sought pursuant to 28 U.S.C. §§ 144 & 455. The factual basis for this relief is hereinafter set forth.

2. Evidentiary hearing. Directing that an evidentiary hearing be convened, in aid of the instant motion, at which the following individuals, or such of them as the Court shall permit, are to be called as witnesses, together with such additional witnesses as the evidence may show have information material to the respective grounds for relief alleged in support of this petition.

(EXPOSURE OF TRIAL JURORS TO PREJUDICIAL PUBLICITY)

(a) Each of the trial jurors;

(b) Every agent of the United States Government who supervised or communicated with the trial jurors from the time of the alleged "shoot-out" through to the point of verdict;

(c) Every agent of the United States Government, if any, who communicated with the trial jurors, subsequent to the verdict, with respect to the exposure of such jurors to the aforesaid prejudicial publicity;

(d) Ronald Wakeel, manager of the Ramada Inn in New Hartford, New York, during the course of the trial herein, and such other employees, guests and visitors of the said Ramada Inn, who have any information concerning the exposure of the trial jurors to sources of information or misinformation with respect to the alleged "shoot-out" including, but not limited to, motel telephone operators, desk clerks who supervised the display and sale of newspapers, maintenance personnel who removed or installed television sets at the rooms of the jurors, and dining room personnel who served meals to the jurors;

(e) The Honorable Lloyd F.MacMahon, United States District Judge of the United States District Court for the Southern District of New York, who presided by designation at the trial herein, and who, admittedly, engaged in ex parte conversation with agents of the United States Government with respect to the question of whether the trial jurors were exposed to sources of information or misinformation concerning the alleged "shoot-out";

(f) Station managers or other record custodians of local television and radio stations that disseminated over the air waves news information concerning petitioner during the period that the jury was sequestered.

(UNNECESSARY AND WRONGFUL INJURY TO PETITIONER)

(g) Every agent of the United States Government who participated in or witnessed injuries visited upon the petitioner, by gun fire or otherwise, while the petitioner was lying on the ground near the aforesaid Ramada Inn, on the evening of February 24, 1973;

(h) All persons known to the government to have witnessed the infliction of the aforesaid injuries upon the petitioner;

(i) The medical personnel who attended the petitioner during the evening of February 24, 1973 and on February 25, 1973;

(j) Every agent of the United States Government who participated in the supervision or direction of the plan by which petitioner was permitted to come within the vicinity of the home of J. Lewis Kelly, on February 24, 1973, and whereby petitioner was subjected to deadly physical force.

3. Disclosure. Directing that the Government, when it responds to the instant motion, provide the attorney for the petitioner or, in the alternative, provide the Court, *in camera* (but, in any event, to be preserved for appellate review), all information in the Government's possesion concerning:

(a) the exposure of the trial jurors to the prejudicial publicity in question;

(b) a statement of all contacts, relevant to this case, between representatives of the United States Government and the trial jurors from the date of the alleged "shoot-out" to the date of the receipt of the instant motion by the Government, and copies of any memoranda which have been made with respect to each such contact;

(c) copies of all memoranda made with respect to the shooting of, and other injuries inflicted upon, the petitioner on the evening of February 24, 1973;

(d) any additional information in the possession of the Government which would be of material assistance to the petitioner in obtaining the relief sought by the instant motion.

## 4. Alternative Relief in Aid of Motion: Deposition of Certain Witnesses.

In the event that the Court should determine that the documentation submitted herewith is insufficient to warrant an evidentiary hearing, that the Court grant to the petitioner, upon notice to the Government, the right to depose the witnesses named or otherwise identified in subsections (a), (b), (c), (d), (e) and (f) of Section II (B)(2), supra, pp. 3-4, of this Notice of Motion, or, at least, such of those witnesses as this Court may otherwise deem the proper subjects of depositions.

## C. Protection of Integrity of Proceedings.

Pending further order of the Court, and in order to avoid intimidation or contamination of witnesses by virtue of further prejudicial publicity, directing that:

(a) the instant motion papers and documents submitted in support of the motion, as well as all documents subsequently filed in this proceeding, be sealed and not open to public disclosure;

(b) that the parties to this proceeding, as well as the officers and employees of this Court, be prohibited from directly or indirectly communicating with any of the above named prospective witnesses concerning the subject matter of these proceedings;

(c) that the parties to this proceeding, as well as the officers and employees of this Court, be prohibited from directly or indirectly disseminating the fact of the pendency of this proceeding to the press.

## D. Declaration of No Prior Collateral Application.

This this Court determine, upon the documentary evidence submitted herewith, and upon such further inquiry as to the Court may seem just and proper, that petitioner Louis Charles King was not properly included as a party litigant in the Memorandum Order of the Honorable Lloyd F. MacMahon, D.J., dated September 5, 1975, which purported to deny post-conviction relief to the petitioner. The factual basis for this request is hereinafter set forth.

## III. JURISDICTIONAL STATEMENT

Petitioner invokes the jurisdiction of this Court, pursuant to 28 U.S.C. § 2255, and submits that the questions presented herein have not been fully and finally litigated by this or any other Court, as to petitioner and that the only prior collateral application of which petitioner is aware resulted in the above noted memorandum order of the Honorable Lloyd F. McMahon, dated September 5, 1975, as to which petitioner submits he was unwillingly and unlawfully included as a party to the Court's determination.

## IV. DOCUMENTS SUBMITTED IN SUPPORT OF THIS MOTION AND IN SUPPORT OF THE INTERIM RELIEF REQUESTED

The following documents are herewith submitted to this Court:

### A. Documents Annexed Hereto

1. Affidavit of petitioner, Louis Charles King, dated

2. Affidavit of Henry J. Boitel, Esq., dated

3. Table of Contents of Appendix of documents which are bound separately.

### B. Documents Not Annexed to this Motion

1. Petitioner's Appendix of documents, the Table of Contents of which is annexed hereto.

## V. STATEMENT OF FACTS

### A. Events Prior to the Shooting of Petitioner

Indictment No. 73 Cr. 9, filed in the United States District Court for the Northern District of New York, was in seven counts which, variously, charged petitioner and others with making, financing and collecting extortionate extensions of credit, and conspiracy to do so (18 U.S.C. §§ 892, 893 & 894). [A. 1]* The other defendants charged by the indictment were Albert J. Marrone, James Vincent Talerico, Jack Zogby, Carl J. Mazza, and "John Doe".

The trial commenced at the United States District Court in the Northern District of New York, at Utica, New York, on February 20, 1973, before the Honorable Lloyd F. MacMahon, United States District Judge as sitting by designation, and a jury. At trial, the petitioner was represented by Louis T. Brindisi, Esq. The Government appeared by Assistant United States Attorney Eugene Welch.

At the outset of the proceedings, the prosecutor requested that the jury be sequestered, stating:

> "The basis of my motion is one to protect the rights of these defendants to a fair trial, in that the arrest of these defendants and prior trial motions have had

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* Citations preceded by "A" are to the petitioner's appendix which is filed herewith.

> publicity in the local news here and the radio, and it is anticipated in view of the request I received at my office with regard to the starting date of this trial, that they will give this trial daily coverage."
> (A. 9-10)

The Court granted the sequestration motion (A. 11) and denied defense counsel's subsequent application requesting that the jury not be sequestered (A. 12-13).

On the following day, defense counsel read into the record a front page article from a local newspaper concerning the fact that the jurors would be sequestered (A. 16-18). Following the selection of the jury, the Court did, in fact, sequester it (A. 21).

As the trial proceeded, the Court would, at the end of the trial day, instruct the jury not to discuss the case with anyone and not to " . . . listen to anything about it on the radio or watch anything about it on television or read anything about it in the newspapers" (A. 22-23).

The Government's case wascentered upon the testimony and activities of one, J. Schuyler Sackman, the recipient of the alleged extortionate extensions of credit. Each count of the indictment relates to the activities of the defendants with respect to Sackman. The central issue at trial, concerning petitioner, was whether Sackman, who instigated a loan to himself while acting as a Government informant, was actually the subject of criminal conduct on the part of the petitioner. Petitioner's defense was that Sackman had cunningly interwoven petitioner into the facts of this case, and had wrongfully pleaded with petitioner to assist him. In short, the issues at trial related to: Sackman's credibility, the presence or absence of criminal intent on the part of the petitioner, and whether or not a government informant working under the supervision and direction of the FBI could be a victim of the type of criminal conduct charged by the indictment. (See Sackman's testimony at A. 24-35, and testimony of petitioner at Tr. 834-859*).

The criminal statutes alleged to have been involved herein required the use or threatened use "of violence or other criminal means to cause harm" if repayments of extensions of credit were delayed (see 18 U.S.C. § 891[6]). It was part of the function of Sackman's testimony to establish that such threats or use of violence had been perpetrated upon him, and that petitioner knowingly and willfully participated in or aided and abetted such conduct (see Sackman's testimony, cited supra, particularly at A. 34-35). It can readily be concluded that if information were imparted to the jurors, extrajudicially, that the petitioner was a man of violence, the jury would be much more likely to convict him despite any problems they might otherwise have with respect to Sackman's credibility or with respect to the Government's tactics in permitting and encouraging Sackman to ensnare petitioner. In this connection, the fact that there were substantial issues which caused the jury difficulty in arriving at its verdict, is demonstrated by the fact that jury deliberations commenced at 11:45 A.M. on February 28, 1973, and did not return with its verdict until 12:15 P.M. on March 1, 1973. The jury's last request, approximately one hour before it reached its verdict, was to hear a recording of a conversation between petitioner and Sackman (A. 79-89).

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* References preceded by "Tr." are to the trial transcript.

### B. The Shooting Incident

The weekend of February 24-25 fell in the midst of the trial. The local newspapers of Sunday, February 25, 1973, exclaimed with front page headlines, photographs and text, concerning an event which allegedly occurred on the prior evening. In short, the papers claimed that petitioner had engaged in a "shoot-out" with Federal and local law enforcement officers after he, allegedly, had sought to throw a live hand grenade into the home of J. Louis Kelly, the agent in charge of the Utica FBI office. Newspaper clippings of February 25, 1973 and of the ensuing days are reproduced at A. 141-158. The newspapers claimed, *inter alia*, that the FBI had been "tipped" to the fact that a "hoodlum" intended to throw a hand grenade into Kelly's home, and that a surveillance had been underway for the prior week with respect to that "tip".

On Monday morning, February 26, 1973, petitioner's attorney moved the Court for a mistrial upon the ground that petitioner had been shot over the weekend and was in critical condition due to the removal of portions of his intestines, serious injury to the arteries of his right leg, and paralysis (A. 37-38). The Court denied the motion upon the ground that petitioner had brought his injuries upon himself (A. 39). The following then occurred:

> "Mr. Brindisi: In view of your Honor's ruling, I would like to have the jury voir dired by the Court to determine whether or not they have obtained any knowledge of the incident that occurred over this weekend.
>
> "The Court: I deny it. The jury has been sequestered during the trial and I am assured by the Marshal that they heard no reports or any incidents over the weekend including the alleged assault by King on the special agent Kelly. [Emphasis added]
>
> "Mr. Brindisi: I say this because I understand they were able to talk to their families.
>
> "The Court: All telephone calls have been screened through the Marshals, and for that reason I refuse to conduct a voir dire at this time or any time. That is why I sequestered the jury and I directed that they couldn't listen to radio reports, or read newspapers or see television reports." [Emphasis added] (A. 40-41)

The Court also denied defense counsel's application that the proceedings be adjourned to St. Luke's Hospital, where petitioner was then a patient, so that petitioner might be present at his own trial, but the Court reserved decision on whether such a procedure might be followed for the purpose of permitting the jury to hear petitioner's testimony (A. 40-42).

After the luncheon recess of that day, defense counsel reported to the Court as follows concerning the apparent fact of exposure of the jurors to publicity, and again asked that a voir dire be conducted of the jury:

> "Mr. Brindisi: Also, during the luncheon recess I spoke to attorney Deery, the attorney for Albert Marrone, and he advised me he talked to the United States Marshal today and he was informed that the jury after being told that they were going to Mass yesterday morning, that they were informed that they were going to take a trip to some institution, and it was cancelled, and they had activities planned for the last evening, which was also cancelled.
>
> "The Court: So what?
>
> "Mr. Brindisi: He informed me also that the jury received newspapers and when they got them they were taken back by the Marshal, and as the Court knows, the incident that occurred over the weekend, it was all over the front page of the newspaper, where the jury could draw any inference.
>
> "The Court: This is just the same motion you made this morning in a different guise.
>
> "Mr. Brindisi: Your Honor, will you voir dire the jury?
>
> "The Court: No, I will not voir dire the jury.
>
> "Mr. Brindisi: I take an exception to your ruling. Thank you." [Emphasis added] (A. 47-48)

At the end of Monday's proceedings, the Court again instructed the jurors that they should not talk about the case and not "listen to anything on the newscast or television or radio. Don't read anything about it in any newspapers. * * * " (A. 50)

Thereafter, the Court granted defense counsel's application for petitioner to testify before the jury at the auditorium of the hospital (see A. 51-56), and proceedings were adjourned to the hospital on the following day, where the surgeon treating petitioner first testified concerning petitioner's condition and appearance. Dr. John Bradford Millett testified that petitioner had been brought into the emergency room on Saturday night in a critical state, in shock, with multiple gun shot wounds and blood loss. He described the wounds as follows:

> "There were 2 in the left shoulder; one in the right axillary; 2 in the chest; one through the sacrum; one through the end of the lateral aspect of the left knee; one in the exterior left thigh; one in the anterior left thigh; I counted a total of approximately 15 perforations made. We could pick up 11 or 12 metal objects or buck shots made by .38 special pistol bullets." (A. 60)

Only some of the bullets were capable of being removed, and due to the injuries, three feet of the petitioner's intestine was removed, he was given a colostomy, he suffered from massive hemorrhage, a large vein and artery were completely severed, etc. (A. 60-61).

The doctor described petitioner's condition:

> "He has a tube in his nose and intravenous in his arms and he has a bandage around his head which can be reduced, and a small bandage in the back of his head." (A. 64)

Some of the bandages were removed before petitioner testified (A. 65), and the Court noted that, "the Court viewed Mr. King to make sure there was nothing in his appearance which would unduly shock the sensitivity of the people on the jury or in any other way work undue prejudice on any of the defendants. Mr. King as the doctor described does have a tube in his nose and another intravenous feeding tube on his right arm I believe" (A. 66).

An amplifier was used so that the jury would be able to hear the petitioner testify (A. 68-69).

After the petitioner's testimony, the proceedings were adjourned back to the Federal Courthouse, with the Court admonishing the jury as follows:

> " * * * I would like you not to talk about the case among yourselves or the testimony you heard now. In fact, I direct you not to let anybody talk to you about it or listen to any radio or look at any TV about it, nor are you to speculate about Mr. King being here. Suffice it to say over the weekend he was injured. Wait until you hear all the case. It is not finished yet, so don't talk about it even among yourselves." (A. 70)

This last admonition was the first judicial statement to the jury concerning petitioner's absence from the trial since February 26, 1973. The Court continued to deny defense counsel's motion that the trial be continued in petitioner's presence (A. 71).

In his summation to the jury, petitioner's attorney could only tell the jury that they should not speculate as to the reason for petitioner's absence (A. 72-74). In doing so, he noted: "I cannot believe that you people can really do that unless you take away your mental abilities completely. You are asked to sit here - - - ", and the Court ruled defense counsel out of order with respect to these latter comments (A. 74-75).

Similarly, in its charge, the Court instructed the jury not to speculate concerning the reasons for the security measures which had existed throughout the trial or concerning King's condition (A. 76-77).

Immediately following the jury's verdict, defense counsel again argued that: 1) the trial should not have been conducted in the absence of petitioner and 2) that it was error for the Court not to voir dire the jury concerning whether they had received any notice of the shooting incident (A. 91). The matter was adjourned to the afternoon for later argument, at which time counsel again objected to the denial of a mistrial and the failure to voir dire the jury, as well as the failure of the trial to be continued, in toto, at a place where petitioner could attend (A. 93-94).

The Court responded as follows:

> "The Court: Whether to conduct a voir dire of the jury is always a matter of the Court's discretion, and in view of the fact that this Court had this jury sequestered, and in view of the fact that they were - - the television was turned off, and no news

> cast and that they didn't have cause to hear the broadcast, and for the further reason that sequestering the jury is to shield them from publicity prejudicial to the defendants.
>
> "Therefore, it could only have been a needless waste of the Court's time and put further delay on this trial under circumstances where safety was paramount, and in the interest of the jury's safety and the interest of the safety of the Court and the witnesses and even defense counsel, and some of the defendants.
>
> "So I denied that motion in the exercise of my discretion, and it was wholly unnecessary and useless under the circumstances to conduct such a voir dire.
>
> "As for your motion to continue the trial at the hospital, that, as I ruled at the time, was not practical under the circumstances. * * * " (A. 95-96)

With respect to the motion for a mistrial with respect to petitioner, the following colloquy occurred between the Court and defense counsel:

> "The Court: You see this was Mr. King's voluntary act. His presence at the home of Agent Kelly, isn't that his own voluntary act?
>
> "Mr. Brindisi: I can't elaborate on it. I can only indicate to the Court that there is a presumption of innocence.
>
> "The Court: I am asking you if his presence at the home of Agent Kelly on Saturday night was a voluntary act.
>
> "Mr. Brindisi: I don't believe so your Honor. I think if the facts were established and an informer was also involved in that situation, and it was a thing that was fully discussed beforehand with the Federal Bureau of Investigation; that the informer led the defendant King to the residence fully knowing

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> that there was no one present in the house at the time, fully knowing that there were Federal officers outside the house ready to shoot Mr. King, and having failed to disclose this to Mr. King at that time.
>
> "The Court: How would that show it was not a voluntary act?
>
> "Mr. Brindisi: I feel that the fact was that the government agencies involved entrapped, if nothing else, Mr. King into going to that residence.
>
> "The Court: That may be the subject of another trial of charges, but the fact he assaulted a Federal officer, I don't think that it has to do with a question whether his act was voluntary. King, as the newspapers report, which is all I know about this, and what you and Mr. Welch have said on the record, plus what the Clerk advised the Court on a Saturday night, and that is that King was seen at the home of Agent Kelly entering an automobile; that he left the car and threw, walked onto the lawn and threw a grenade into the window and when they tried to apprehend him he got back into the car and fled away. Are those the facts or aren't they?
>
> "Mr. Brindisi: I really don't think those are the facts." (A. 101-103)

The Court then directed the prosecutor to produce a witness "as to what if anything King did at the Ramada Inn" (A. 103).

Counsel for one of the other defendants then noted, with respect to the incident:

> " * * * The prejudice is that the atmosphere and the conduct of this trial changed tremendously from last Friday to Monday. The mere presence of many more deputy marshals, law enforcement officers in the courtroom and in close proximity of the jury could

> have had a direct bearing upon their deliberations. * * * " (A. 106)

The attorney further argued:

> "I further for the record would like to state that it was error by your Honor to refuse the defendant's request to inquire if any of the jury, at least of the Marshals or people in whose custody the jury was, or any other persons who may have come in contact with the jury wherever they were housed, or any employees of the place where they were housed. I can see if your Honor please failing in regard to actual interrogation of the jurors themselves, but I would like to urge the argument that it was error of the Court not to conduct such hearing." (A. 107-108)

The Court acknowledged the presence of a substantial number of law enforcement officers in the Courtroom during the trial (A. 109).

In response to similar remarks by another attorney, the Court stated:

> "To conduct a voir dire only would serve to heighten and intensify the very feeling that you say was aroused by the Court's failure to do so. As I have already said, they were shielded purposely. The purpose has been particularly careful that in no way to mention to anything other than what occurred in Court or about any defendants in which would in any way have prejudiced another. A jury would have to be fools not to conclude that a man who is hale and hearty in front of them at 5:00 on Friday afternoon and in a hospital the following Monday, they can certainly assume later when we took his testimony at the hospital that he had suffered some injury over the weekend. He was not even able to sit up in a chair and the Court felt that without disclosing any violence that the Court had to tell them the fact that the man was injured over the weekend." (A. 115-116)

The Court then proceeded to take the testimony of an FBI agent for the purpose of establishing that petitioner had voluntarily absented himself from the trial. This was over the protests of petitioner's attorney, who argued that such a hearing could not properly be held in the absence of the petitioner (A. 116-121). FBI Agent Edgar A. Bergholtz then gave one page of testimony in which he stated that on February 24, 1973, at approximately 7:45 P.M., he saw petitioner exit a car, walk toward Agent Kelly's house, "punch in the front window. There was a flash, two shots. There was some shooting and then King got into the car and drove away." A grenade was thereafter found in the house which had not been there earlier (A. 121-122). Defense counsel declined to cross-examine upon the ground that he had not obtained the authority of his client to do so (A. 122). The Court then found that petitioner had voluntarily absented himself from the trial (A. 123-137). In the course of its ruling, the Court noted:

> " * * * And as Mr. Brindisi reported on Monday morning, shortly thereafter King was apprehended a few miles away in the parking lot of the Ramada Inn motel, and as Mr. Brindisi did not report but as the Court then knew that motel was the place where this jury had been sequestered from the beginning of this trial. The Court does not know whether King's arrival there was accidental or coincidental or deliberate. It is of no moment. Again, according to reports both from Brindisi and the Assistant United States Attorney, and it has been widely publicized, shots were

> exchanged and King was further injured and taken to St. Luke's Hospital * * * ." (A. 127-128) [Emphasis added]

After postponements due to petitioner's injuries (A. 138-139, 161-162), petitioner was eventually sentenced on May 25, 1973, to serve seven concurrent terms of 20 years imprisonment, and to pay a fine of $ 10,000 (A. 140c).

In commenting upon the evidence, the Court stated to petitioner:

> "It shows you to be a cold-blooded, cruel, vicious and violent man as to society." (A. 140c)

In contrast to the sentences imposed upon petitioner, the co-defendants Marrone and Talerico, each received sentences of 7 years imprisonment and the co-defendants Zogby and Mazza, each received sentences of 10 years imprisonment (A. 195).

## C. The Appeal

Appeals were taken by each of the defendants, and their convictions were all affirmed, without opinion, by the United States Court of Appeals for the Second Circuit on November 28, 1973, 486 F. 2d 1397, *cert. denied*, 466 U.S. 958 (1974).

A copy of petitioner's brief in the Court of Appeals is reproduced at A. 163-196. Point IV of the brief at A. 183-185, argued that the shooting incident required the declaration of a mistrial because the circumstances generated by that incident created "a presumption of impartiality" on the part of the jury. Point V, at A. 186-190 argued that the trial court erred in not conducting a voir dire of the jury in order to ascertain whether any prejudicial publicity concerning the shooting incident had reached the jury. Point VI, at A. 191-194 argued that the trial should not have continued in the defendant's absence, and that the hearing concerning the voluntariness of the defendant's absence, itself, should not have been conducted in the defendant's absence.

We have also reproduced at A.197-225, the Government's brief in the Court of Appeals, so as to provide this Court with a complete demonstration of the manner in which the issues were presented to the Court of Appeals.

The petition for a writ of certiorari is reproduced A. 227-256, and is, in substance, a repetition of the brief filed in the Court of Appeals.

### D. The April 9, 1975 Petition for Relief, Pursuant to 28 U.S.C. § 2255 and F.R.C.R.P. Rule 33

On or about April 9, 1975, an application was made to the trial judge, pursuant to 28 U.S.C. § 2255 and F.R.C.R.P. Rule 33, for an Order setting aside and vacating the sentences of petitioner, and co-defendants Talerico, Zogby and Mazza, upon the ground that evidence had been uncovered which demonstrated the need for a hearing as to whether the jurors had been exposed to prejudicial publicity concerning the shooting incident (A. 258-260).

The petition was supported by the affirmation of attorneys Brindisi, Longertta and Manganelli (A. 261-267). They alleged that, subsequent to the sentencing of the defendants, the attorneys spoke with Ronald Wakeel, the manager of the Ramada Inn at which the jury had been sequestered, and alongside of which the shooting incident came to an end. They state that Wakeel told them that each of the juror's rooms had working television sets, that there was no manner in which the management could monitor those television sets, that the jurors were free to select their choice of programming, that there was not a United States marshal in each juror's room throughout the evening in question, that the jurors ate in the main dining room open to the general public, that the public in the dining room and other public portions of the motel had newspapers at their disposal, and that Wakeel made further statements concerning the atmosphere which prevailed at the motel during the days following the shooting incident. The attorneys further stated that Mr. Wakeel, at first, indicated a willingness to sign such an affidavit, but after several weeks, he advised the attorneys that the Board of Directors of the Ramada Inn had directed him not to sign such an affidavit.

The affirmation of the attorneys further stated, "that because of the admonition of Justice [sic] Lloyd F. MacMahon, your affirmants are prohibited from questioning the jurors" (A. 266).

A response to the petition was filed by the Government on or about May 16, 1975 (A. 268-279). The Government opposed the application upon the grounds that: 1) it was insufficient on its fact, since it was predicated upon Wakeel's hearsay statements; 2) the trial record shows that "the jury did not hear of the incident" (A. 271); 3) the issue has already been litigated by virtue of the trial court's rulings during and immediately following the trial, as well as by virtue of the appeal taken by the defendants; 4) the shooting incident had been the result of petitioner's "own deliberate misconduct", and it cannot now exploit the results of that misconduct; 5) "further proceedings present needless dangers to innocent people, the jury" (A. 276).

On September 5, 1975, the trial judge filed a memorandum order denying the petition (A. 295-301). The grounds for the denial are set forth at A. 300: 1) Wakeel's statements as reported in the affirmation of counsel were hearsay; 2) in any event, the same contentions had been advanced at trial, on appeal, and in the petition for a writ of certiorari, thus precluding their reassertion.

### E. Facts Showing that Petitioner Was Not Properly a Party to the May 16, 1975 Application for Collateral Relief, and That He Should Not Be Bound by the Court's Determination of that Application

As already noted, a petition for relief pursuant to 28 U.S.C. § 2255 had been filed on April 9, 1975, and purported to be filed, inter alia, in the name of petitioner. The facts show that petitioner was not aware of the filing of that petition at the time it was filed, or for some time thereafter, and that as soon as he found it had been filed, he directed that his attorney advise the Court that he was not a party to it.

The records of this Court show that on June 18, 1975, Louis T. Brindisi, Esq. wrote to the Clerk of this Court, enclosing a letter purporting to be written to Mr. Brindisi by petitioner (A. 280). The letter in question, which is dated June 5, 1975, and which is unsigned, is particularly critical of the trial judge and of his motivations in the case, and does not demonstrate an awareness of the fact that a Section 2255 motion had already been filed. Attached to it is an analysis of _Baker_ v. _Hudspeth_, 129 F. 2d 779 (10th Cir., 1942). The letter was clearly not written with the intention that it be forwarded to the trial judge.

On June 30, 1975, the petitioner wrote Mr. Brindisi, stating that he had just learned, through hearsay, that the Section 2255 motion had been filed (A. 283); _see_ King affidavit at pp. 1-2.* The letter goes on to specifically instruct Mr. Brindisi:

> "This is to advise that I do _not_ want any such motion filed on my behalf at this time. I am presently in the process of engaging other counsel to make a

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* Annexed hereto is the affidavit of the petitioner. Hereinafter, it will be referred to as the "King affidavit."

> thorough review of my case toward the end of filing a motion to vacate the sentence and conviction under 28 U.S.C. § 2255. There are several grounds I wish to assert in addition to the one you are attempting to raise now, but I have not completed my research and investigation pertaining to these other points yet, and I feel that if you file anything now, you will raise problems for me later under the 'successive petition' doctrine of Sanders v. U.S., 373 U.S. 1 (1963).
>
> "So, to reiterate, please do not file anything on my behalf at this time. If you have done so, please withdraw same immediately, before the Court makes any ruling thereon." [Emphasis added]

The above noted letter was sent by certified mail, return receipt requested, with copies to each of the other attorneys in the case (A. 284).

On July 7, 1975, Mr. Brindisi wrote to petitioner enclosing a copy of the filed petition, and acknowledging petitioner's letter of June 30, 1975 (A. 285; King Affidavit at pp. 1 - 2 ). It further requested additional confirmation that petitioner wanted the filed motion withdrawn.

On July 10, 1975, before receiving Mr. Brindisi's letter of July 7, 1975, petitioner again wrote to Mr. Brindisi (A. 286; King Affidavit at pp. 1-2 ). His letter requested copies of documents in the case and requested an acknowledgement of the receipt of his last letter. As with all the petitioner's correspondence, this letter, too, was by certified mail, return receipt requested (A. 287).

On July 17, 1975, petitioner wrote directly to the trial judge (A. 288), specifically advising the trial judge, " . . . that I did not want any kind of motion filed on my behalf", and that "I am once again sending a request to Mr. Brendisi to officially withdraw me as a party to the motion. I never desired any motion to be filed on my behalf, I so indicated to Mr. Brindisi and I consider myself withdrawn as of June 30, 1975, and I am not a party to this action" (A. 288-289).

On July 17, 1975, petitioner again wrote to Mr. Brindisi reaffirming his surprise that a motion for collateral relief had been filed and his desire that it be withdrawn immediately (A. 290-291).

On August 21, 1975, Mr. Brindisi wrote to the petitioner stating that Mr. Brindisi had " . . . sent letters to the Clerk of the United States District Court and also to the Attorney General's office, withdrawing your name from the motion which was made pursuant to 28 U.S.C. § 2255" (A. 292).

On September 5, 1975, Judge MacMahon filed his memorandum order denying the petition. The memorandum recited petitioner as a party to the proceeding, and makes no mention of his effort to withdraw from the proceeding which had been commenced in his name without his knowledge or authority (A. 295-301).

On September 29, 1975, petitioner wrote to Mr. Brindisi questioning how it was possible for the Court's memorandum to have "included me", in view of the clear record that petitioner did not want to be a party to the proceedings (A. 293-294;

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King Affidavit, at pp. 1-2 ).

On October 2, 1975, Mr. Brindisi wrote to Judge MacMahon, reaffirming petitioner's wish that he not be included in the proceeding. A copy of that letter was sent to the petitioner, together with an added note from Mr. Brindisi to petitioner, and attaching a copy of Mr. Brindisi's letter of July 25, 1975 to the Clerk of the District Court (A. 302-305).

Despite the history of petitioner's efforts to extricate himself from a collateral proceeding which had been precipitously commenced without his authorization, it does not appear that any of this correspondence was acted upon either by the Clerk of the District Court or by Judge MacMahon. It demonstrates, nonetheless, that petitioner cannot now be properly taxed with the filing of successive petitions.

### F. The Evidence Upon Which the Instant Petition is Predicated

#### 1. Background Provided by the Existing Record

Any evidence which we would now place before the Court must be viewed within the context of the existing record. A brief review of the known facts, as set forth at length, _supra_, is in order.

In the midst of trial, petitioner became involved in an incident with FBI and local law enforcement officers, leading to extraordinary injuries being visited upon petitioner. The incident spilled over into the parking lot area of the Ramada Inn at which the jurors were sequestered. There can be no doubt that the scene at and near the Ramada Inn was both extraordinary and tumultuous. The possibility exists that the jury received first hand knowledge of what was occurring. There is, however, no evidence of record, one way or the other, on that question.

As the record stands, we know only that Judge MacMahon spoke, ex parte, to a United States Marshal who assured Judge MacMahon that the jurors had not been exposed to information concerning the incident. The unidentified Marshal has made no statement on the record to that effect, nor has he made a sworn statement, nor has he been subjected to any questioning by or in the presence of anyone representing the petitioner.

It is also clear that the incident generated enormous publicity in the Utica area. Commencing on the evening of the incident, there was substantial radio and television publicity, and on the following morning, newspaper headlines blared the details and photographs of the incident. Such publicity continued throughout the trial (see newspaper clippings at A. 141, et seq.; see also Boitel affidavit at p. 3 *). Indeed, Judge MacMahon commented upon the publicity (supra, p.20 ).

There has been no voir dire conducted by the Court of the jury, and we do not, therefore, have any statement, one way or the other, from the jurors, as to whether any of the publicity reached them. Indeed, before discharging the jury, Judge MacMahon instructed the jurors as follows:

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* Annexed hereto is the affidavit of Henry J. Boitel, Esq., present attorney for the petitioner. Hereinafter, the affidavit is cited as "Boitel Affidavit".

> " * * * . . . I want to caution you again not to talk about this case. If anybody tries to talk to you, with you, you are to contact the FBI immediately.
>
> "Now you are all adults and this is a serious matter and if anybody tries to contact you about this case, call the FBI immediately. You are excused." (A. 89-90)

Additionally, the trial attorneys were of the understanding that they were prohibited from contacting the jurors (*supra*, p. 23 ).

### 2. The Executed Statement of a Juror

The records of this Court will show that one of the trial jurors herein was Helen Postal. On October 26, 1975, Mrs. Postal executed a statement, acknowledging that she was a trial juror. She further states that while staying at the Ramada Inn during the trial she had the opportunity to read newspapers and read articles of the case. It further appears that she saw "news briefs" on the television which was available in her room at the Ramada Inn. Finally, she states that when the trial resumed on Tuesday, the 27th of February, 1973, and the Court convened in St. Luke's Hospital, she was "aware why the defendant was in the Hospital at that time."

A copy of Mrs. Postal's statement is reproduced at

A. 307. It bears the signatures, as witnesses, of Michelle Malina and Vict DeSantia. Although the statement is captioned as an affidavit, it is not, in fact, notarized.

When Henry J. Boitel, Esq. was retained to represent the petitioner herein, and was advised of the existence of Mrs. Postal's statement, he engaged Joseph T. Mullen, a licensed private investigator, to interview Michelle Malina, one of the persons who had witnessed Mrs. Postal execute the statement. (Boitel Affidavit, at pp.1-2). Michelle Malina's affidavit, dated June 24, 1976, is reproduced at A. 306 . It states, in pertinent part, as follows:

> "2. On October 26, 1975, I was present when Mrs. Helen Postal signed the attached affidavit. On this occasion, I also signed the document which I am re-signing today, June 24, 1976.
>
> "At the time Mrs. Postal stated that she was a juror in the conspiracy/extortion trial of four men including Louis Charles King in February of 1973. She further stated that during the trial she and the other jurors stayed at the Ramada Inn on Burrstone Road in New Hartford, New York. During her stay she read newspaper accounts of the trial and saw television coverage as well. Mrs. Postal also confirmed that she and the other jurors dined in the Ramada Inn's main dining room which was open to the public.
>
> "When the trial resumed on February 27, 1973, Mrs. Postal stated in my presence that she was aware why Mr. King was in St. Luke's Hospital."

### 3. The Oral Statements of Ronald Wakeel and the Directive that He Not Execute an Affidavit.

On September 8, 1976, after extended efforts to contact Ronald Wakeel, the manager of the Ramada Inn, Mr. Boitel interviewed Mr. Wakeel by telephone. Mr. Wakeel had previously spoken to Investigator Mullen, and, subject to his attorney's approval of the content thereof, he agreed to execute an affidavit concerning his knowledge of the shooting incident and of the circumstances under which the jurors were lodged subsequent to the shooting incident. (Boitel Affidavit, at pp. 2-5). During the course of the telephone interview, Mr. Wakeel stated that he was on duty at the Ramada Inn throughout the day and into the evening. As he was leaving the lounge of the Ramada Inn, to obtain a pack of cigarettes, he became aware of a disturbance in the driveway area. He then learned that an incident had occurred in which petitioner had been shot and was lying on the ground of the driveway, and that a number of Federal and State law enforcement officers were in the area.

Wakeel further stated that to his recollection, the jurors were lodged on the second and third floors of the Ramada Inn, as were several marshals and, perhaps, the trial judge. He confirmed that the Motel records concerning the lodging arrangements are still in existence and will be made available to the Court upon request.

Wakeel assumes that the jurors were in their rooms or in the vicinity thereof, at the time of the incident, and he

50

has no recollection of seeing any of the jurors in the vicinity of the incident or on the first floor of the Motel. He further confirms that from at least some of the jurors' rooms it may have been possible for a person to see from the room window some of the police cars that arrived at the scene of the incident, but those windows did not provide a view of the place where petitioner was lying on the ground.

He further stated that each of the jurors' rooms had direct dial telephones for jurors to dial out, and that no switchboard or other device for monitoring such calls or for preventing the unfettered use of the telephones, was in effect at any time during the course of the jurors' stay. If any of the jurors made such telephone calls, there was an automatic meter record. The Motel records for any such calls are still in existence and will be made available to the Court upon request.

With respect to incoming telephone calls, all such calls were received by the Ramada Inn switchboard operator, who was under instructions to direct such calls to the United States Marshals who were charged with supervising the jury sequestration.

Additionally, there were public telephones in the Motel, and Wakeel has no knowledge of whether or not any of the jurors used such public telephones.

Wakeel further stated that the jurors took their meals in the same common dining room that was used by the other guests of the Motel, and by any members of the public who wished to use the restaurant. In going to and from the dining room, the jurors would pass through the public areas of the building, and through the dining room, itself, to a rear area of the dining room. He confirms that if other patrons of the restaurant had newspapers in open view, the jurors would have been able to see such newspapers as they passed. Additionally, other patrons were seated at tables in the proximity of where the jurors' tables were located, and if such guests had newspapers in open view, the jurors would have been able to see such newspapers. Similarly, it was possible for the jurors to overhear conversations of patrons who may have been seated nearby.

Wakeel stated that he had no actual knowledge of whether any particular juror did, in fact, have any information communicated to him.

Wakeel further stated that newspapers were on sale in the lobby of the Motel, but that precautions had been taken so that such newspapers were not prominently displayed, but rather, when it was understood that the jurors would be passing through, the newspapers were kept behind the lobby desk. He does not exclude the possibility that if a juror had some reason to make an inquiry at the desk, it might have been possible for the juror to see the newspapers behind the desk.

Finally, each of the jurors' rooms had working television sets throughout the period that the jurors were lodged at the Motel. Several days after the shooting incident, the Marshals instructed that the television sets be removed from the rooms of the jurors. While the process of removing the television sets was occurring, the Marshals revoked their instruction and directed that the television sets be left in the jurors' rooms. As the television sets were being replaced in the jurors' rooms, the jurors arrived back at the Ramada Inn, and the television sets remained in the rooms throughout the remainder of their stay. No device was in effect which would have physically prevented any juror from turning his television set on and off or which would have limited the television programs available to the sets. The sets functioned in the same manner as the television sets in the rooms of all other Motel guests. Wakeel stated that he was not aware of any device in operation at the Ramada Inn which would have enabled anyone outside of a juror's room to know whether a television set was on or off or to know what, if any, broadcast was being viewed and heard on the television sets.

On the same day of Mr. Boitel's conversation with Mr. Wakeel (September 8, 1976), Mr. Boitel drafted an affidavit containing the facts which had been stated by Mr. Wakeel. He sent it, with a covering letter, requesting that the affidavit be executed. The covering letter and the proposed affidavit are, respectively, reproduced at A. 308 , 309 . The concluding portion of the covering letter stated:

> "In the event that the affidavit, as drawn, mistates some fact or if you wish to add or modify some statement so as to have the affidavit more accurately reflect the events in question, please feel free to make such changes as you deem appropriate. If you or your attorney wish to contact me with respect to the affidavit, either or both of you should feel free to do so.
>
> "My only requests are that the matter be completed as soon as possible and that you only state the truth as you know it." (A. 308)

On September 16, 1976, Mr. Boitel received a telephone call from Andrew S. Kowalczyk, Jr., Esq., of the law firm of Kernan & Kernan, in Utica, New York. Mr. Kowalczyk stated that he was calling in behalf of Mr. Wakeel, that Mr. Wakeel had received Mr. Boitel's letter of September 8, 1976 and the proposed affidavit, that the local board of directors of the Ramada Inn had directed Mr. Wakeel not to execute any affidavit with respect to this matter, but that the board of directors would not oppose the taking of Mr. Wakeel's deposition if such deposition is ordered to be taken by a court and if the United States Attorney's Office is given the opportunity to attend and also examine Mr. Wakeel. (Boitel Affidavit, at p. 4 ; _see also_: Letter of September 16, 1976, discussed _infra_).

On that same day (September 16, 1976), Mr. Boitel wrote to Mr. Kowalczyk, with a copy to Mr. Wakeel, confirming the telephone conversation with Mr. Kowalczyk (A.316) . The letter made an urgent request that the board of directors reconsider their position since, ". . . the proper administration and the liberty of an individual are at stake." The letter alternatively proposed that Mr. Wakeel's deposition be taken at any place in the Utica Area, on notice to the United States Attorney's Office, with an opportunity for that Office to ask any questions of Mr. Wakeel that it might wish. The letter requested that Mr. Kowalczyk respond as to whether the board of directors would either reconsider its position or consent to the alternative proposal. It was sent by certified mail, return receipt requested (A. 317).

To the date of the filing of this petition, neither Mr. Kowalczyk, nor Mr. Wakeel, nor anyone in their behalf or in behalf of the board of directors of the Ramada Inn, has responded to Mr. Boitel's letter of September 16, 1976 (Boitel Affidavit, at p.5).

## VI. FACTS CONCERNING THE EXCESSIVE DEADLY FORCE TO WHICH PETITIONER WAS SUBJECTED AND WHICH PREVENTED HIM FROM ATTENDING AT THE TRIAL.

It is clear that Federal and local agents expected petitioner to arrive at Agent Kelly's home, and were lying in wait for him there. They knew that, in fact, there was no one in the home to be injured. They apparently made no prior effort, despite their prior knowledge, to prevent the petitioner, in advance, from executing whatever plan they thought he had in mind. Instead, their apparent intent was to permit the situation to reach a deadly force level. Having arrived at that point, the law enforcement officers unleashed a veritable firing squad assault upon the petitioner - nothing else can explain the gross number of bullets which entered the petitioner's body.

Having been able to make his way away from the scene, and toward the local hospital, which was located near the Ramada Inn, petitioner fell out of his car at that point, and his body lay prone, face down in the snow. Law enforcement officers then approached him, as he lay there, and fired three bullets point blank into his back. (King Affidavit, at p. 3 ). Under all of these circumstances, it is no wonder that the petitioner was not able to continue to attend at his own trial; indeed, it is remarkable that he survived.

## VII. LEGAL BASIS FOR VACATING THE SENTENCE AND GRANTING THE OTHER ITEMS OF REQUESTED RELIEF.

### POINT ONE

### IF THE JURORS WERE, IN FACT, EXPOSED TO PUBLICITY CONCERNING THE SHOOTING INCIDENT IN WHICH PETITIONER WAS INVOLVED, THEN PETITIONER WAS DEPRIVED OF A FAIR TRIAL AND HE IS ENTITLED TO VACATION OF THE SENTENCE AND JUDGMENT.

Although the trial judge refused to question the jurors concerning whether they had been exposed to knowledge of the shooting incident, his stated reason for not doing so was that he believed the jurors had not, in fact, been so exposed. His basis for that belief appears to have been an ex parte conversation with an unidentified United States Marshall who was one of those charged with insulating the jurors from such exposure.

By this petition, we have placed before the Court a signed statement of a trial juror, acknowledging that, during the trial, she had read newspaper accounts concerning the petitioner and had seen television reports concerning him, and knew why he was in the hospital.

Aside from the aforementioned direct evidence of knowledge on the part of at least one juror, we have also placed before the Court a circumstantially reliable assessment of what the manager of the Ramada Inn would state, if called as a witness, with respect to the communications environment in which the jurors existed while sequestered. In short:

> 1. The windows of some of the jurors' rooms made it possible for some of the jurors to have direct knowledge of a significant police incident adjacent to the Motel on the evening in question;
>
> 2. The ability of the marshals to supervise the jurors was limited by virtue of the fact that each of the jurors' rooms had working telephones which were not subject to being monitored or intercepted with respect to directly dialed telephone calls out of the jurors' rooms;
>
> 3. Each of the jurors' rooms had working television sets, and there is no evidence that there was a marshall in every jurors' room. It is clear that the shooting incident

gave rise to numerous and continuing television reports. Even a juror who intended to abide completely by the Court's instructions, would have no way of avoiding exposure to unanticipated television bulletins or news stories;

4. The jurors had to pass through public areas of the Motel several times each day, and they ate their meals in a public dining room at the Motel. Given the notoriety of the shooting incident, and the prominent front page headline treatment which it was accorded in the local press, there is no way of knowing, short of interviewing the jurors, whether they were exposed to newspaper publicity or to the conversations of guests or Motel workers concerning the incident.

The trial court's statements, following the incidents and through to the end of the trial, contain the implicit assumption that if the jurors had been exposed to such information, it would have been prejudicial to the defendant.

The information now placed before the Court certainly overcomes any ex parte, unrecorded assertions that an unidentified Marshal made to the trial judge. That evidence should, at least, entitle petitioner to a hearing at which the jurors can reveal what, if any, information they learned. Despite the passage of time, it is unlikely in the extreme that any of the jurors would not now have a clear memory of whether he did or did not know of the shooting incident before the jury was discharged.

With respect to the statements made by a Marshal to the trial judge, we note that the statements and conduct of those charged with protecting the trial jurors have, on several occasions, been shown to be unreliable. See: United States ex rel. Tobe v. Bensinger, 492 F. 2d 232 (7th Cir., 1974); Parker v. Gladden, 385 U.S. 363 (1966). See also: United States v. Guthrie, 387 F. 2d 569 (4th Cir., 1967), where it was held that ex parte communications to the Court denying that a juror had been exposed to prejudicial information, will not eliminate the necessity for a hearing, even though such ex parte communications are under oath and the contents thereof are disclosed to the defense in haec verba.

### A. Exposure of Jurors to Extra-judicial Information Concerning a Defendant is Presumptively Prejudicial and Affirmative Proof of Harmlessness is Required to Overcome that Presumption.

Writing for the Supreme Court, more than sixty years ago, Mr. Justice Holmes stated:

> "* * * The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." Patterson v. Colorado, 204 U.S. 454, 462 (1907).

In Remmer v. United States, 347 U.S. 227, 229 (1953), the Court held:

> "In a criminal case, any private communication, contact or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court during the trial, with the full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." [Emphasis added]

The same principle was recently reasserted by the United States Court of Appeals for the Second Circuit in United States v. Brasco, 516 F. 2d 816, 819 (2d Cir., 1975); see also: United States v. Thomas, 463 F. 2d 1061 (7th Cir., 1972).

The mere fact, "that the jury was instructed on numerous occasions to consider only evidence presented in open court.", will not defeat a motion to set aside a verdict, based upon exposure of a juror to prejudicial extra-judicial information. Gafford v. Warden, 434 F. 2d 318 (10th Cir., 1970).

### B. An Evidentiary Hearing is Required Where Facts are Shown Which Indicate that One or More Jurors May Have Been Exposed to Prejudicial Publicity.

United States v. Valenciano, 495 F. 2d 585 (3rd Cir., 1974), states the applicable rule with respect to the requirement of a hearing in a proceeding brought under 28 U.S.C. § 2255:

> "Facially, this record colloquy [concerning whether a defendant had entered

> a plea of guilty without threats, inducements or promises] would seem to be conclusive, but the brute fact is that Congress has mandated an evidentiary hearing in a § 2255 proceeding '[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief....' 28 U.S.C. § 2255. The possibility exists that an inherent part of the out-of-court understanding was that appellant would respond negatively to an open court inquiry as to whether promises had been made. In any event, the allegations are directed to evidentiary matters not in 'the files and records of the case.'" 495 F. 2d at 587.

Similarly, in Marchibroda v. United States, 368 U.S. 491(1962), the Court set out in unequivocal terms the circumstances under which a petitioner is entitled to an evidentiary hearing:

> "We think the district court did not proceed in conformity with the provisions of 28 U.S.C. § 2255, when it made findings on controverted issues of fact without notice to the petitioner and without a hearing. United States v. Hayman, 342 U.S. 205. The statute requires a district court to 'grant a prompt hearing' when such a motion is filed, and to 'determine the issues and make findings of fact and conclusions of law with respect thereto' unless 'the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.' This was not a case where the issues raised by the motion were conclusively determined either by the motion itself or by the 'files and records' in the trial court. The factual allegations contained in the petitioner's motion and affidavit, and put in issue by the affidavit filed with the government's response, related primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light. Nor were the

> circumstances alleged of a kind that the district judge could completely resolve by drawing upon his own personal knowledge or recollection." (368 U.S. at 494-495) [Emphasis added]

In the present case, the only evidence in the record concerning the exposure of the jury to publicity of the shooting incident, is the fact that the jury was sequestered, and the trial court's conclusory statement concerning hearsay allegations by a United States Marshal to the effect that none of the jurors had suffered such exposure. In contract, this petition presents to the Court a juror's executed statement that she received extra-judicial communications, during the trial, by means of newspaper and television, concerning the petitioner, and that she was then aware of the reason for the petitioner's hospitalization. This petition further shows, by virtue of the statements of Mr. Wakeel, the Motel Manager, that the jurors had working television sets in their rooms throughout the period in question, and that the television sets were not equipped with any device which would have limited the programming or alerted persons outside the room as to what was being seen or heard on the television. Additionally, his statements show that jurors had regular contact with the public under circumstances which may have exposed them to, at least, the front pages of newspapers and perhaps to conversation. The dramatic events which occurred right outside the Motel cannot be ignored in considering the extent to which those events may have been discussed by persons who visited or worked in the Motel.

The facts presented by this petition, therefore, fit squarely into the hearing requirements of 28 U.S.C. § 2255 as interpreted by the Supreme Court of the United States.

## POINT TWO

### THE UNSWORN STATEMENTS OF MR. WAKEEL PROPERLY PROVIDE A BASIS FOR AN EVIDENTIARY HEARING OR, ALTERNATIVELY, FOR AN ORDER DIRECTING MR. WAKEEL TO SUBMIT TO A DEPOSITION.

It is petitioner's contention that the executed statement of the juror, alone, necessitates the grant of a hearing. Particularly in view of the juror's statement, the unsworn statements of Mr. Wakeel to petitioner's attorney take on an overwhelming significance. Moreover, in view of the trial court's direction, after the verdict, that none of the jurors converse with anyone concerning the case, petitioner has been left with no means at his disposal which will permit him to uncover further facts. Finally, Mr. Wakeel, himself, is apparently willing to disclose what he knows, and has been prevented from doing so by direction of his employer.

It is true that in denying a prior application (to which petitioner was not properly a party) for § 2255 relief, based upon unsworn statements of Mr. Wakeel, Judge MacMahon rejected those statements as being insufficient due to their hearsay nature. (A. 299-300). One cannot pause but to note that Judge MacMahon's basis for concluding, at the time of trial, that the jurors had not been exposed to prejudicial publicity was, itself, based upon the hearsay assertion of a United States Marshal. In contrast to such a conclusory, ex parte assertion, Mr. Wakeel's statements are detailed and specific, readily capable of being confirmed at a hearing, and cast extreme doubt upon the Marshal's claim.

In People v. DeLucia, 20 N.Y. 2d 275, 278, 282 N.Y.S. 2d 526, 528 (1967), the New York Court of Appeals concisely stated the principle which should be applied to the predicament which confronts the petitioner:

> "Where the Supreme Court holds that a particular series of events, when proven, violates a defendant's constitutional rights, implicit in that determination is the right of the defendant to prove facts substantiating his claim."

See also: ABA Project on Minimum Standards for Criminal Justice - Trial by Jury, § 5.7(c)(i).

In United States v. Eagle, 539 F. 2d 1166 (8th Cir., 1976), one of the jurors admitted, following the trial, that he realized during the trial that the defendant was one of the men charged with the shooting of two F.B.I. Agents in an unrelated incident. On a motion for a new trial, the defendant moved to subpoena the jurors, and the motion was denied. The information concerning the particular juror had been obtained by the defendant's attorney from another attorney who claimed to have spoken to the juror in question. A hearing was held on the motion, and the attorney testified as a witness.

In United States v. McKinney, 429 F. 2d 1019 (5th Cir., 1970), the defendant had escaped from the local jail while awaiting trial, and the escape received extensive coverage in newspapers in the area. Following his subsequent apprehension, conviction and sentencing, his attorney brought a motion to set aside the verdict upon the ground that the jurors had discussed the jail break incident. The basis for the claim by the attorney was "that such discussion of the above facts and the misconduct of the jurors had been confirmed to the defendant's Court-appointed attorney by the juror. . .". No affidavits or other evidence was submitted in support of the motion, and it was denied by the trial court.

On appeal, the Court, in McKinney, held:

> "In the present case, we think it is clear that an evidentiary hearing should have been held to investigate the allegation in McKinney's motion for a new trial. Since the trial court did not hold such a hearing, but merely entered an order overruling the motion, a remand to the trial court would appear to be the proper disposition of this case." (429 F. 2d at 1026).

The Court in McKinney, in holding that it was an abuse of discretion for the trial court not to hold a hearing, continued as follows:

> "The government next attempts to defend the trial court's failure to hold a hearing on the ground that McKinney did not make an adequate factual showing at trial. His motion for a new trial was not accompanied by any supporting affidavits or other evidence, and it is the government's view that 'the motion on its face was inadequate to even

> raise a substantial question as to the issue of misconduct or the possibility of prejudice arising therefrom.' We cannot agree. McKinney's allegation mentioned jury discussion of a specific incident as allegedly related to McKinney's counsel by a specific juror, whose name and address were given. The factual import of the allegation is clear, and the inclusion of the allegation in the motion for a new trial, without supporting affidavits, was not procedurally inappropriate." (429 F. 2d at 1030) [Emphasis added]

As the above noted authorities show, there are circumstances where allegations, although based upon hearsay, will nevertheless require the grant of an evidentiary hearing. In view of the circumstances of the present case, it would be difficult to imagine a more appropriate case for the application of that requirement.

## POINT THREE

### THE TRIAL JUROR WHO HAS GIVEN A STATEMENT, AS WELL AS THE OTHER TRIAL JURORS, MAY PROPERLY TESTIFY WITH RESPECT TO ANY EXTRA-JUDICIAL INFORMATION WHICH WAS CONVEYED TO THEM CONCERNING THE PETITIONER DURING THE COURSE OF THEIR SEQUESTRATION.

Rule 606(b) of the Federal Rules of Evidence provides

> "(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's minds or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous

> prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about what he would be precluded from testifying be received for these purposes."

In testifying before the Special Subcommittee on Reform of Federal Criminal Laws of the Committee on the Judiciary House of Representatives, 93 Congress, 1st Session, on the proposed rules of evidence, serial no. 2, at p. 250, Circuit Judge Friendly stated as follows, in distinguishing the types of inquiries which may be addressed to jurors following a verdict:

> "* * *If for example, it has been found that some inflammatory newspaper article had gotten into the jury room, I think all of us would want to have that verdict upset."

Similarly, the Advisory Committee, with respect to the Federal Rules of Evidence, noted as follows concerning Rule 606:

> "The policy [against jurors' impeachment of their own verdicts] does not, however, foreclose testimony by jurors as to prejudicial extraneous information or influences injected into or brought to bear upon the deliberative process. Thus a juror is recognized as competent to testify to statements by the bailiff or the introduction of a prejudicial newspaper account into the jury room, Mattox v. United States, 146 U.S. 140 (1892). See also: Parker v. Gladden, 385 U.S. 363 (1966)."

In a letter, dated August 12, 1971, quoted in Weinstein's Evidence, at pp. 606-15, Senator John L. McClellan asserted:

> "I have no objection to permitting

> jurors to testify that improper information came to their attention. This may be necessary to protect verdicts from improper influences, especially by the news media."

The principle in question is a long-standing one and is really without doubt. *Mattox* v. *United States*, 146 U.S. 140, 149 (1892); *Government of Virgin Islands* *Gereau*, 523 F. 2d 140, 148-149 (3rd Cir., 1975); *United States* v. *Wilson*, 534 F. 2d 375 (D.C.Cir., 1976).

The fact that the exposure to newspaper publicity may have been outside the jury room, is irrelevant. In *United States ex rel. Owen v. McMann*, 435 F. 2d 813 (2d cir., 1970), *cert den.*, 402 U.S. 906 (1971), one of the jurors had apparently told other jurors about various misconduct in which the defendant had been involved. The Court held as follows:

> "The State's approving citation of United States v. Crosby, 294 F. 2d at 949-950 (2d Cir.), indicates that it would not assert that while a juryman could testify he had read a newspaper article with extra-record information outside the jury room, he could not reveal his communication of it to other jurors within that sanctum. There is no rational distinction between the potentially prejudicial affect of extra-record information which a juror enunciates on the basis of the printed word and that which comes from his brain." (435 F. 2d at 820).

The jurors in the present case are clearly competent to testify as to whether they were the recipients of any information concerning petitioner during the course of their sequestration. Moreover, based upon the principles enunciated in

Point One, supra, the witnessed statement of one of the jurors, supported by an affidavit of the witness, compels the conclusion that that juror should be called to testify at a hearing. Her statement, combined with the information obtained from Mr. Wakeel (the Motel Manager), compels the conclusion that the remaining jurors should be similarly summoned to testify.

## POINT FOUR

### IN THE EVENT THAT THIS COURT SHOULD DETERMINE THAT THE AVAILABLE EVIDENCE DOES NOT JUSTIFY A HEARING, THEN THIS COURT SHOULD ORDER THAT THE RELEVANT WITNESSES SUBMIT TO DEPOSITIONS.

In Harris v. Nelson, 394 U.S. 286, rehearing den., 394 U.S. 1025 (1969), the Supreme Court discussed remedies available to a petitioner who is seeking to collaterally attack his conviction:

> "At any time in the proceedings, when the court considers that it is necessary to do so in order that a fair and meaningful evidentiary hearing may be held so that the court may properly 'dispose of the matter as law and justice require,' either on its own motion or upon cause shown by the petitioner, it may issue such writs and take or authorize such proceedings with respect to development before or in conjunction with the hearing of the facts relevant to the claims advanced by the parties, as may be 'necessary or appropriate in aid of [its jurisdiction]***and agreeable to the usages and principles of law.' 28 U.S.C. § 1651.
>
> "We do not assume that courts in the exercise of their discretion will pursue or authorize pursuit of all allegations presented to them. We are aware that confinement sometimes

69

> induces fantasy which has its basis in the paranoia of prison rather than in fact. *But where specific allegations before the court show reason to believe that the petitioner may, if the facts or fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry*. Obviously, in exercising this power, the court may utilize familiar procedures, as appropriate, whether these are found in the Civil or Criminal Rules or elsewhere in the 'usages and principles of law.'"(394 U.S. at 300).

To the same effect *see*: *Argo* v. *United States*, 473 F. 2d 1315 (9th Cir., 1973); *Wagner* v. *United States*, 418 F. 2d 618, 621 (9th Cir., 1969).

Petitioner respectfully urges that, in the event that the information presently before the Court on this petition is not deemed to warrant an evidentiary hearing, then for the reasons advanced *supra*, the Court should permit petitioner to depose each of the witnesses set forth *supra*, at pp. 3-4, ¶¶ A through F, inclusive, or, in the alternative, such of those witnesses as the Court may deem just and proper.

## POINT FIVE

### THE COURT SHOULD DIRECT THE GOVERNMENT TO PROVIDE PETITIONER, IN ADVANCE OF THE HEARING, AND IN AID OF THE INSTANT MOTION, ALL MEMORANDA IN ITS POSSESSION CONCERNING THE SHOOTING INCIDENT AND CONCERNING THE EXPOSURE OF THE JURY TO EXTRA-JUDICIAL INFORMATION CONCERNING PETITIONER.

In view of the restrictions which have heretofore been imposed upon the petitioner's access to information, he respectfully submits that, pursuant to the authorities cited under Point Four, supra, this Court should exercise its discretion in favor of directing the government to provide petitioner's counsel with any information which the government has in its possession which would shed light upon the factual issues raised by this petition. In the alternative, we respectfully request that this Court direct the government to provide all such information to this Court, for in camera review. A sense of justice demands that information helpful to the Court's determination should not remain buried in a government file.

## POINT SIX

### PENDING AN EVIDENTIARY HEARING, THIS COURT SHOULD PROTECT THE INTEGRITY OF THESE PROCEEDINGS BY DIRECTING THAT THE PARTIES AND COURT PERSONNEL NOT DISSEMINATE THE CONTENTS OF THIS PETITION OR THE CONTENTS OF THE GOVERNMENT'S RESPONSE TO THE PUBLIC OR THE PRESS.

This Court clearly has the inherent power to protect the integrity of its proceedings. In the present case, it is most important that petitioner's rights not be further eroded by prejudicial publicity which will reach the trial jurors before they are summoned to testify as witnesses. Moreover, it is important that the trial jurors remain free from pressures by either side or suggestions that they may have engaged in misconduct by virtue of their exposure to publicity during the course of the trial or their past failure to volunteer the fact of such exposure.

We request therefore that this Court forthwith direct that the parties and Court personnel are prohibited from disseminating to the public or the press the fact of the pendency of these proceedings or the contents of papers filed in this proceeding, pending further order of the Court.

## POINT SEVEN

## THE PRIOR APPLICATION FOR RELIEF, PURSUANT TO 28 U.S.C. § 2255, DOES NOT FORECLOSE CONSIDERATION OF THE INSTANT PETITION.

As set forth supra, at pp. 22-28 , and in the annexed affidavit of the petitioner, at pp. 1 - 2 , the petitioner was never a proper party to the prior effort at collateral attack, denied by Judge MacMahon on September 5, 1975. Moreover, the facts advanced in support of this petition are significantly more substantial than those advanced in support of the prior petition. Specifically, there is now presented to the Court an executed and witnessed statement of a juror, acknowledging exposure to extra-judicial information concerning the petitioner.

This is not, therefore, a "successive petition", and should not be denied upon that ground. Additionally, the instant petition asserts an additional basis for relief, to wit: the intentionally and unnecessary use of deadly force upon petitioner, which prevented him from attending at his own trial. (See: Point Nine , infra, p. 55 ).

## POINT EIGHT

### THE ISSUES RAISED BY THIS PETITION HAVE NOT BEEN PREVIOUSLY ADJUDICATED ON DIRECT APPEAL.

Petitioner's brief, filed in connection with his direct appeal, sets forth the arguments raised on the appeal (A. 163, et seq.). The brief argued that a mistrial should have been granted due to "possible prejudice" resulting from the shooting incident, that the trial court should have questioned the jurors as to whether they had been exposed to any prejudicial publicity, and that the mere fact of petitioner's inability to attend the trial required the declaration of a mistrial as to him.

As can be seen, there was no evidence before the appellate court to the effect that the jurors had actually been exposed to such publicity or to the effect that the extent of the injuries inflicted upon the petitioner was the result of the excessive use of force.

## POINT NINE

### THE EXCESSIVE USE OF DEADLY FORCE BY THE LAW ENFORCEMENT OFFICERS WHO APPREHENDED HIM, PETITIONER WAS UNABLE TO ATTEND AT HIS TRIAL AND, THEREFORE, WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO CONFRONT AND CROSS-EXAMINE THE WITNESSES AGAINST HIM.

Petitioner's affidavit, which is annexed hereto, shows that at a point when he had been rendered helpless, and was under the complete control of law enforcement authorities, several bullets were shot into his back at point blank range, as he lay face down in the snow (King Affidavit, at p. 3-4 )

New York Penal Law § 35.30 sets forth the basis upon which a peace officer may utilize deadly physical force against a suspect:

> "Justification; use of physical force in making an arrest or in preventing an escape.
>
> "1. A peace officer, in the course of effecting or attempting to effect an arrest, or of preventing or attempting to prevent the escape from custody, of a person whom he reasonably believes to have committed an offense, may use physical force when and to the extent he reasonably believes such to be necessary to effect the arrest, or to prevent the escape from custody, or to defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force; except that he may use deadly physical force for such purposes only when he reasonably believes:
>
> (a) the offense committed by such person was:
>
> (i) a felony or an attempt to commit a felony involving the use or attempted use or threatened imminent use of physical force against a person; or
>
> (ii) Kidnapping, Arson, Escape in the First Degree, Burglary in the First Degree, or any attempt to commit such a crime; or
>
> (b) the offense committed or attempted by such person was a felony and that, in the course of resisting arrest therefor or attempting to escape from custody, such person is armed with a firearm or deadly weapon; or

> (c) Regardless of the particular offense which is the subject of the arrest or attempted escape, the use of deadly physical force is necessary to defend the peace officer or another person from what the officer reasonably believes to be the use or imminent use of deadly physical force.
>
> * * *"

[Bracketed material added]

If petitioner is correct in his perception of the manner in which a number of his injuries were sustained, there is no reasonable construction of the above noted statute, nor any other rational justification for the infliction of the injuries in the manner alleged.

Petitioner had a clear Constitutional right to attend at his trial. If his own wilfull actions prevented his attendance, then he waived that right. However, if police officers exceeded the rational scope of their authority and inflicted inflicted injuries upon the petitioner to a far greater extent than could reasonably have been deemed necessary, and if those injuries prevented petitioner's attendance at the trial, then he was clearly deprived of his Sixth Amendment right.

For the above noted reasons, this petition advances as a second ground for relief, the excessive use of force to which petitioner was subjected. In considering this issue, we urge the Court to take into account the fact that the law enforcement officers involved obviously were lying in wait for petitioner at Agent Kelly's home, and do not appear to have made any effort to intercept petitioner before the situation escalated into one of violence.

## POINT TEN

### PURSUANT TO 28 U.S.C. §§ 144 &455, THE HONORABLE LLOYD F. MACMAHON IS DISQUALIFIED FROM FURTHER PARTICIPATION, AS A JUDICIAL OFFICER, IN THESE PROCEEDINGS, AND THIS PETITION SHOULD BE ASSIGNED TO A DIFFERENT DISTRICT JUDGE.

28 U.S.C § 144 provides as follows:

> "Bias or prejudice of judge.
>
> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of an adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceedings.
>
> "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exist, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

Whenever a motion is made under 28 U.S.C. § 144 for the disqualification of a judge, the Court may pass upon the sufficiency of the affidavit, but may not pass upon the truth of the matters alleged. Berger v. United States, 255 U.S. 22 (1922); Action Realty Co. v. Will, 427 F. 2d 843, 844 (7th Cir., 1970); United States v. Roca-Alvarez, 451 F. 2d 843, 847-848

76

(5th Cir., 1971); Rosen v. Sugarman, 357 F. 2d 794, 797 (2d Cir., 1966); Wolfson v. Palmieri, 396 F. 2d 121, 124 (2d Cir., 1968).

As was noted in Wolfson v. Palmieri, supra:

> "***Comments and rulings by a judge during the trial of a case may well be relevant to the question of the existence of prejudice. Conceivably also, and we shall assume this in petitioner's favor, as was done in Rosen v. Sugarman, supra, contacts during a trial might themselves have created such a degree of irritation with a party or his lawyer as to create the bent of mind to which the Supreme Court referred in Berger." (396 F. 2d 124-125)

As indicated, in Berger v. United States, supra, the Supreme Court of the United States held that to be sufficient an affidavit must show "the objectionable inclination or disposition of the judge", and it must give "fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment" (255 U.S. at 33-35).

In United States v. Womack, 454 F. 2d 1337 (5th Cir., 1972), it was held that a trial judge should have disqualified himself, citing certain comments which the judge had made concerning Womack in the course of proceedings against other defendants:

> "We now turn to the sufficiency of the affidavits. The law on this question is extensive but we need not belabor its breadth or nuances to decide this case, in which the allegations of the affidavits are clearly sufficient. During the Musgrave trial, the judge referred to appellant as a man 'who everybody admits was certainly a shady character'

> and told the jury: 'If you find that Musgrave did this there is no question but that Womack was working with him hand and glove...he would be as culpable.'" (454 F. 2d at 1341)

In Action Realty Co. v. Will, supra, 427 F. 2d at 845, the following was noted:

> "We would add to the foregoing salutory pronouncement that no doubt some judges, even though not biased or prejudiced, have denied motions for a new judge simply because of a feeling that to grant the motion could be construed to be an admission of the non-existent ground for disqualification.
>
> "This motivation, we feel, should never deter a judge from granting the motion if the over-all administration of justice, and the needs of the particular litigation are improved thereby. This is the same basic policy which precludes the entering of a compromise in settlement as being considered an admission of liability." (427 F. 2d at 845).

In the present case, petitioner's affidavit of disqualification alleges that Judge MacMahon has personal bias or prejudice against him or in favor of the government, as indicated by the following:

1. The principal ground alleged in this petition relates to the question of whether the jury was exposed to prejudicial extra-judicial information. The trial judge's persistent refusal to poll or question the jurors as to that issue, presents a likelihood that he will not be able to objectively assess the allegations of this petition or the evidence which may be produced at a hearing;

2. At the time of sentence, Judge MacMahon characterized petitioner as, "a cold-blooded, cruel, vicious and violent man as to society." (A. 140c).

3. Moreover, the sentence which Judge MacMahon imposed upon petitioner far exceeded the sentences imposed upon the codefendants, despite the fact that even if the government's evidence were believed, petitioner's conduct was far less egregious than that of certain of the other defendants;

4. Despite repeated requests that petitioner's name be removed from a prior petition, pursuant to 28 U.S.C. § 2255, since it had been filed without his knowledge or consent, no action appears to have been taken by Judge MacMahon to do so, either before or after the rendition of his opinion;

5. Judge MacMahon's source of information concerning the exposure of jurors to extra-judicial information was, itself, based upon extra-judicial information, and that factual problem goes to the heart of the present application.

6. As noted supra, p. 24 , and in the King Affidavit, at pp.1-2, and in the petitioner's affidavit of disqualification, at p.3-4, petitioner's trial counsel improperly forwarded to the trial court a communication from petitioner to his trial attorney, which cast aspersions upon the motivations and intent of Judge MacMahon. That letter (A. 281) is necessarily a part of the record in this case, and a part of the instant proceedings. Presumably, it came to the attention of Judge MacMahon at the time

it was filed; certainly it will come to his attention upon the instant motion. Thus, through no fault of his own, the petitioner has had exposed to Judge MacMahon the contents of an attorney-client communication which was never intended for Judge MacMahon's eyes, and which is likely to prejudice Judge MacMahon's view of the petitioner.

It is respectfully submitted that, for the reasons stated, the requirements of 28 U.S.C. § 144 have been met, and Judge MacMahon should proceed no further herein.

28 U.S.C. § 455 provides, in pertinent part, as follows:

> "Disqualification of justice, judge, magistrate, or referee in bankruptcy.
>
> "(a) Any justice, judge... of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> "(b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings.
>
> * * *
>
> (5) He ...***(iv) is to the judge's knowledge likely to be a material witness in the proceeding.
>
> * * *
>
> "(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

80

> (1) "Proceeding" includes pretrial, trial, appellate review or other stages of litigation.
>
> * * *
>
> "(e) No justice, judge...shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification."

It is clear that Judge MacMahon is a witness in this case. He obtained information, ex parte, from a United States Marshall, and utilized that information for the purpose of making his determination not to examine the jury at the time of trial. If petitioner is granted an evidentiary hearing, Judge MacMahon will be called as a witness for the purpose of ascertaining the identity of the Marshal in question, and for the purpose of ascertaining the substance of the information given to Judge MacMahon by the Marshal.

For all of the above reasons, it is respectfully urged that Judge MacMahon disqualify himself or be disqualified from further participation in these proceedings.*

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*The application for disqualification of Judge MacMahon has been made part of this petition since, having been the trial judge, the petition will, as a matter of course, be forwarded to him by the Clerk of this Court. Moreover, in order for Judge MacMahon to adequately assess the merits of the disqualification motion, the factual and legal assertions of the petition are obviously a relevant consideration.

## Conclusion

WHEREFORE, for the reasons stated, the petitioner, who is presently incarcerated at the Lewisburg Federal Penitentiary, in Lewisburg, Pennsylvania, respectfully requests that: the Honorable Lloyd F. MacMahon be disqualified from participating, in a judicial capacity, in any further proceedings in this case, and that the Court vacate petitioner's sentence pursuant to 28 U.S.C. § 2255, and grant him a new trial.

Respectfully submitted,

HENRY J. BOITEL
Attorney for Petitioner
Louis Charles King
233 Broadway
New York, New York 10007
(212) RE 2-8104

New York, New York

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK AT UTICA

-------------------------------------X

LOUIS CHARLES KING, :

Petitioner, :

vs. :

UNITED STATES OF AMERICA, :

Respondent. :

-------------------------------------X

Civ. Action No.: ______
(Related Criminal
Docket No. 73 Cr. 9)

## AFFIDAVIT OF COUNSEL

STATE OF NEW YORK )
)
COUNTY OF NEW YORK ) ss.:

HENRY J. BOITEL, ESQ., being duly sworn, deposes and says:

1. I am the attorney for the petitioner, Louis Charles King, with respect to the instant motion, which is brought pursuant to 28 U.S.C. § 2255, and with respect to the incidental relief which the motion requests. I was not his trial or appellate counsel, and I was not aware of any of the events of this case until the current calendar year.

2. Following the point at which I was retained in this case, the petitioner sent to me what purported to be a photostat of a statement executed by one of the trial jurors herein, Mrs. Helen Postal, and which appeared to be witnessed by Michelle Malina and a Mr. Vict [sic] DeSantia. From my examination of the records in this case, it has been my understanding that the trial judge prohibited anyone from contacting the trial jurors

about the case subsequent to trial. Since the executed statement of Mrs. Postal was not notarized, and since it would not have been appropriate for me to contact her, I engaged the services of a licensed private investigator, Joseph T. Mullen, and requested that he interview one of the persons who witnessed the execution of the statement, Michelle Malina. As a result, Mr. Mullen provided me with Michelle Malina's affidavit, to which was annexed a photostat of Mrs. Postal's statement, to which Michelle Malina had again affixed her signature. These two documents are reproduced at A. 306-307.

3. In studying the records of this case, I examined the petition, pursuant to 28 U.S.C. § 2255, which had been filed under Docket No. 75 Civ. 172. Those papers revealed to me that Ronald Wakeel, the manager of the Ramada Inn, in New Hartford, New York, appeared to possess information which would be of value with respect to the instant petition. I requested that Mr. Mullen interview Mr. Wakeel, but he eventually reported back to me that he was only able to have a brief telephone conversation with Mr. Wakeel, and that Mr. Wakeel had expressed a willingness to execute an affidavit containing his knowledge of the matter, subject to his attorney's approval of the contents of the affidavit.

4. On September 8, 1976, I was able to reach Mr. Wakeel by telephone at the Ramada Inn. A number of prior efforts to do so had been unsuccessful due to Mr. Wakeel's schedule.

5. I explained to Mr. Wakeel that I was an attorney, retained by petitioner, for the purpose of presenting this Court with the facts relating to the conditions under which the jurors were sequestered at the Ramada Inn. Mr. Wakeel thereafter freely answered my questions concerning the physical circumstances under which the jurors were lodged and took their meals at the Ramada Inn. He also advised me that the Motel records concerning the jurors' stay, and concerning outgoing telephone calls are still in existence and will be made available upon the Court's request. He further advised me concerning the telephones and television sets in the jurors' rooms, the existence of newspapers in the Ramada Inn, and concerning the presence of guests and members of the general public at the Ramada Inn.

6. Based upon the information which Mr. Wakeel imparted to me, I drew the proposed affidavit which is reproduced at A.309, and sent it to him with the covering letter which is reproduced at A. 308. Rather than prolonging these papers by detailing the contents of the material aspects of my conversation with Mr. Wakeel, I respectfully refer the Court to the proposed affidavit which, as I have indicated, is reproduced at A. 309. It contains the substance of the information which Mr. Wakeel communicated to me, and I believe he would execute it if he were free to do so.

7. The Court will note that my covering letter to Mr.

Wakeel (A. 308 ), states:

> "In the event that the affidavit, as drawn, misstates some fact, or if you wish to add or modify some statement so as to have the affidavit more accurately reflect the events in question, please feel free to make such changes as you deem appropriate. If you or your attorney wish to contact me with respect to the affidavit, either or both of you should feel free to do so.
>
> "My only requests are that the matter be completed as soon as possible and that you only state the truth as you know it."

8. The above noted letter and affidavit were sent to Mr. Wakeel by First Class Mail on September 8, 1976.

9. On September 16, 1976, I received a telephone call from a person who identified himself as Andrew S. Kowalczyk, Jr., of the firm of Kernan & Kernan, of Utica, New York. Mr. Kowalczyk advised me that he was calling in behalf of Mr. Wakeel, and that Mr. Wakeel would not execute the proposed affidavit since the board of directors at the Ramada Inn had prohibited him to do so. He further advised me that the board of directors would not oppose the taking of Mr. Wakeel's deposition, if such deposition is ordered to be taken by a Court and if the United States Attorney's Office is given the opportunity to attend and also examine Mr. Wakeel.

10. I explained to Mr. Kowalczyk that I anticipated difficulty in following such a course since the trial judge had already declined to order a hearing based upon hearsay allegations concerning Mr. Wakeel's proposed testimony. Mr. Kowalczyk

advised me that he was familiar with the prior proceeding and that he understood the difficulty. However, he continued, he did not believe that the board of directors of the Ramada Inn would change its position.

11. I requested that Mr. Kowalczyk confirm his communication to me in writing; however, he declined to agree to do so. I, therefore, on that same day, September 16, 1976, wrote to Mr. Kowalczyk, by Certified Mail, Return Receipt Requested, (A. 316-318 ), confirming the material contents of our conversation and requesting that he reconsider with the board of directors of the Ramada Inn the question of whether they would persist in their position. I proposed, as an alternative to Mr. Wakeel's executing an affidavit, that we take Mr. Wakeel's deposition at any place in the Utica Area, on notice to the United States Attorney's Office, with opportunity for that office to ask any questions of Mr. Wakeel that it wished. I further requested that he advise me if I had misstated or omitted any material aspects of our conversation, and that he further advise me as to the board of directors disposition of my request that their decision be reconsidered. To this date, I have received no response from Mr. Kowalczyk.

12. I have examined the contents of the petition herein, and I believe it has merit, and that this Court should convene an evidentiary hearing.

Respectfully submitted,

/s/ Henry J. Boitel

HENRY J. BOITEL

Sworn to before me this 5th

day of January , 197

NOTARY PUBLIC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK AT UTICA

-------------------------------------X

LOUIS CHARLES KING, :
Petitioner, :
vs. :
UNITED STATES OF AMERICA, :
Respondent. :

-------------------------------------X

Civ. Action No.: ________
(Related Criminal
Docket No. 73 Cr. 9)

AFFIDAVIT

STATE OF PENNSYLVANIA )
)
COUNTY OF ) ss.:

LOUIS CHARLES KING, being duly sworn, deposes and says the following according to his knowledge, belief, and best recollection:

1. I am the petitioner herein and I make this affidavit in support of the within motion for relief pursuant to 28 U.S.C. § 2255.

2. I have read the motion herein, and to the best of my knowledge and belief the allegations contained therein are true. I am this day separately executing an affidavit in support of my related application that the Honorable Lloyd F. MacMahon, the United States District Judge who presided at my trial, be disqualified from hearing and determining the issues presented by the instant motion.

3. At pp. 24-28, the motion sets forth the facts con-

cerning correspondence to me and from me with respect to my desire that I not be included in a petition for relief, pursuant to 28 U.S.C. § 2255 and F.R.Cr.P. Rule 33, which was filed with this Court on April 9, 1975. Each of the letters alleged to have been sent by me or alleged to have been received by me were, in fact, sent and received as indicated, and the copies of those letters which appear in the petitioner's appendix are in fact true copies.

4. I hereby reassert that the petition of April 9, 1975 was submitted without my knowledge or authorization, and that as soon as I learned of such filing, I took every step in my power to legally withdraw myself from the proceeding.

5. I further state that my correspondence to my former attorney, Mr. Brindisi, which was annexed to his letter to the Clerk of this Court dated June 18, 1975, was not intended by me to be so filed. Instead, it was a communication to Mr. Brindisi as my attorney (A. 280-282). I was particularly distressed and embarrassed by the forwarding of that communication to the Court since it contains unguarded and personal comments which could only have the effect of prejudicing my cause.

6. Based upon the contents of the petition and of the record in this case, this Court is aware of the fact that I sustained serious injuries on the evening of February 24, 1973, and that the events of that night brought me to the parking lot of the Ramada Inn. I advise the Court as follows with respect to the events which then occurred.

7. When I staggered out of the automobile on the Ramada Inn parking lot, I didn't make it far and fell face down, but I was conscious until after I was placed in the ambulance. I just couldn't move at all, but could see and hear. I saw three pairs of legs walk up to me, but no more, because I could move only my eyes. I distinctly recall the following, although I cannot state to whom the voices belonged:

> FIRST VOICE: "Here he is!"
>
> SECOND VOICE: "Yea, I see him."
>
> FIRST VOICE: "You know he's not armed."
>
> SECOND VOICE: "I know he's not armed, but we'll arm this son of a bitch!"

8. I then heard a thud in front of my face and could see it was a shiny, chrome revolver with a four to six inch barrel. Then the legs disappeared from in front of me, and I next heard a shot and felt a blow in my back which caused a spasmodic jerk of my body. Then I heard and felt the second explosion which did practically as the first. The third shot hit close to the spine and it caused both of my legs to jerk up and back hard enough that my feet struck my back. Then I heard the following:

> FIRST VOICE: "Imagine! It took all those shots to kill this son of a bitch!"

9. As will be verified by the doctors, there were seventeen shots which penetrated my body, and every one of them entered from the back of my body. By the time the ambulance arrived, there were some people about but they made the ambulance

drivers wait for forty minutes, at least, and I am certain that the ambulance drivers would testify to that fact. Then, I heard the following conversation:

> SECOND VOICE: "Don't move him for Gallagher is en route (New York State Police Investigator, Thomas Gallagher)."
>
> FIRST VOICE: "We'll drag him from that area because he may have another gun under him."

10. After Agent Gallagher arrived, he inserted one tine of a grappling hook into my rib cage under the right arm. He actually stuck it into my flesh and lung. He attached it to the bumper of a car, and dragged me about two hundred or three hundred feet. I believe that the ambulance drivers also witnessed that, and finally the Federal agents permitted the ambulance to haul me away. It is also my understanding that someone present, other than myself, threw a dummy grenade down at the parking lot.

11. If this Court has any hesitation in accepting my word as a preliminary showing that the above events took place, I will eagerly take a polygraph test if it is administered by any recognized polygraph expert who is not connected with any of the parties to this suit. I realize that polygraph tests are not generally recognized as competent evidence in a court of law; however, my objective is not to utilize such a test for the purpose of establishing my case; but rather for the purpose of inducing this Court to permit me to prove my case.

12. I have read this affidavit carefully, and I be-

lieve it to be true to my knowledge and best recollection. I respectfully urge the Court to grant the motion herein, set aside the conviction herein, and grant me a new trial. I truly believe that I am entitled to it for the reasons set forth in the motion.

/s/ Louis C. King
LOUIS CHARLES KING

Sworn to before me this 30
day of Nov , 1976

/s/ M B Locksey
NOTARY PUBLIC
Parole Officer, authorized by
Act of July 7, 1955, to admin
ister oaths (18 U.S.C. 4004)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK AT UTICA

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| | | |
|---|---|---|
| LOUIS CHARLES KING, | : | Civ. Action No.: ______ (Related Criminal Docket No. 73 Cr. 9) |
| Petitioner, | : | |
| vs. | : | **AFFIDAVIT OF DISQUALIFICATION** |
| UNITED STATES OF AMERICA, | : | |
| Respondent. | : | |

--------------------------------------X

STATE OF PENNSYLVANIA )
) ss.:
COUNTY OF )

LOUIS CHARLES KING, being duly sworn, deposes and says:

1. I am the petitioner herein, and I make this affidavit in support of the within motion that the Honorable Lloyd F. MacMahon be disqualified from further proceedings in this case upon the grounds that his prior participation in this case evidences his bias and prejudice against me and in favor of the government, and upon the further ground that he is a material witness with respect to facts upon which one of the grounds of my petition for relief, pursuant to 28 U.S.C. § 2255, is predicated.

2. I believe and I assert as follows:

a. The trial judge's persistent refusal to call or question the jurors as to whether they had been exposed to prejudicial extra-judicial information, presents a likelihood that he will not be able to objectively assess the allegations of this petition or the evidence which may be produced at a hearing. The principal ground alleged in the petition is precisely the question of whether the jury or any member thereof was so exposed.

b. At the time of sentence, Judge MacMahon characterized me as, "a cold-blooded, cruel, vicious and violent man as to society." (A. 140c). Since he presumably believes these characterizations to be true, it is unlikely that he can impartially pass upon the issue of whether the judgment herein should be set aside.

c. Judge MacMahon's opinion of me is amply demonstrated by the fact that he imposed an effective sentence upon me of twenty years imprisonment, whereas the sentences imposed upon the four co-defendants ranged from seven to ten years. An examination of the trial record in this case will demonstrate that my conduct, relating to the underlying charges, as claimed by the government's chief witness, was far less egregious than that of certain of the other defendants.

d. Despite repeated requests that my name be removed from a prior petition, brought pursuant to 28 U.S.C. § 2255 since it had been filed without my knowledge and consent, no action appears to have been taken by Judge MacMahon to do so, either before or after the rendition of his opinion denying that relief.

e. Judge MacMahon's source of information concerning the exposure of jurors to extra-judicial information, a principal issue raised by the instant petition, was, itself, based upon extra-judicial information, and that problem goes to the heart of the present application. A ruling upon the present application, must necessarily involve an assessment of Judge MacMahon's judgment in accepting a Marshal's claim that the jury had been kept inviolate, in refusing to poll the jury, and in directing that the jurors have no discussions with any one concerning the instant case.

f. Following the denial of certiorari with respect to the judgment of conviction entered against me herein, my attorney took it upon himself to precipitously join with the attorneys for my co-defendants in filing a petition for relief, pursuant to 28 U.S.C. § 2255. Unaware of what had been done, I forwarded a letter and a memo to my attorney with respect to a contemplated application for such relief. That letter (reproduced at A. 281) contains statements concerning the trial judge, which I repeat here with much reluctance, since they were originally intended solely for the eyes of my attorney, as an attorney-client communication. They are as follows:

> "***Our opinion is that the judge became cognizant of some misconduct, and the instructions now complained of was a deliberate attempt by the Judge to prevent discovery of a vital error, and it was a scare tactic that

accomplished its purpose.***"

After Mr. Brindisi received my letter, he merely forwarded it to the Clerk of the District Court with a covering letter which stated:

> "Enclosed herein is a letter I received recently from my client which I would like to have made part of the motion made by all defendants pursuant to 28 U.S.C. § 2255."

Presumably, Judge MacMahon read the letter which I had written to my attorney, before rendering his decision of the motion which had been filed without my consent. I did not learn that my letter had been forwarded to the Court until my present attorney, Henry J. Boitel, Esq., arranged for a search of the District Court file, and uncovered the letter.

WHEREFORE, I respectfully pray that the Honorable Lloyd F. MacMahon proceed no further in this cause, and that another judge be assigned to hear this action.

Respectfully submitted,

/s/ Louis C King
LOUIS CHARLES KING

Sworn to before me this
30 day of Nov , 1976

/s/ MB Cooksey
NOTARY PUBLIC
Parole Officer, Authorized by
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK AT UTICA

-------------------------------------X

LOUIS CHARLES KING, :
Petitioner, :
vs. :
UNITED STATES OF AMERICA, :
Respondent. :

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Civ. Action No.: ________
(Related Criminal
Docket No. 73 Cr. 9)

CERTIFICATE IN SUPPORT OF APPLICATION FOR DISQUALIFICATION OF DISTRICT JUDGE.

HENRY J. BOITEL, being counsel of record for the petitioner in the above noted proceeding, hereby certifies that the application herein, pursuant to 28 U.S.C. § 144 & 455, is made in good faith.

/s/ Henry J. Boitel
HENRY J. BOITEL

New York, New York

January 5, 1977

U. S. DISTRICT COURT
N. D. OF N. Y.
FILED
JAN 18 1977
AT ______ O'CLOCK ______ M.
J. R. SCULLY, Clerk
UTICA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

----------------------------------x

LOUIS CHARLES KING, :

Petitioner, : 73-CR-9

:

- v - **MEMORANDUM**

:

UNITED STATES OF AMERICA, :

Respondent. :

----------------------------------x

MacMAHON, District Judge.*

Petitioner's ex parte application for a protective order is denied. See Nebraska Press Ass'n v. Stuart, _____ U.S. _____, 44 U.S.L.W. 5149 (June 30, 1976).

Petitioner is directed to serve a copy of his petition for relief under 28 U.S.C. § 2255 upon the United States Attorney forthwith; the Government is directed to file and serve its response to all of petitioner's claims, supported by a memorandum of law, within thirty (30) days of service; and petitioner may, if he is so advised, file and serve a reply memorandum of law within ten (10) days of service of the Government's response.

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* Of the Southern District of New York, sitting by designation.

In the interim, the Clerk is directed to docket and seal the file in this proceeding until further order of the court.

So ordered.

Dated: New York, N. Y.
January 13, 1977

Lloyd F. MacMahon
LLOYD F. MacMAHON
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF NEW YORK

LOUIS CHARLES KING,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

CIVIL ACTION NO. ___________

(Related Criminal Docket No.)
73 Cr. 9

## GOVERNMENT'S MEMORANDUM IN OPPOSITION TO MOTION TO VACATE JUDGMENT AND SENTENCE FILED BY PETITIONER, LOUIS CHARLES KING, ON JANUARY 7, 1977

THE GOVERNMENT'S RESPONSE TO PETITIONER'S MOTION WILL BE AS FOLLOWS:

Page

PROCEDURAL BACKGROUND . . . . . . . . . . . . . . . . . . . 1

GOVERNMENT'S RESPONSE TO PETITIONER'S FACTUAL STATEMENT . . 2

GOVERNMENT'S RESPONSE TO PETITIONER'S POINTS IN THE FOLLOWING ORDER:

1. Response to Point Ten . . . . . . . . . . . . . . . 6
2. Response to Point One "A" . . . . . . . . . . . . . 10
3. Response to Point One "B" . . . . . . . . . . . . . 13
4. Response to Point Two . . . . . . . . . . . . . . . 17
5. Response to Point Three . . . . . . . . . . . . . . 26
6. Response to Point Seven . . . . . . . . . . . . . . 29
7. Response to Point Eight . . . . . . . . . . . . . . 31
8. Response to Point Nine . . . . . . . . . . . . . . 33
9. Response to Point Four . . . . . . . . . . . . . . 36
10. Response to Point Five . . . . . . . . . . . . . . 39
11. Response to Point Six . . . . . . . . . . . . . . 40

CONCLUSION . . . . . . . . . . . . . . . . . . . . . . . . 41

## PROCEDURAL BACKGROUND

On March 1, 1973, after a jury trial of approximately seven days, defendant, Louis Charles King, Jr., petitioner herein ("petitioner") was convicted in this district of violations of Title 18, United States Code, Sections 892 and 894, Extortionate Credit Transactions, and was thereafter sentenced to a prison term which he is now serving. Petitioner was tried and convicted along with three other individuals and the convictions of all four defendants were affirmed by the Second Circuit Court of Appeals at 486 F.2d 1397 (1973), cert. denied, 416 U.S. 958, 91 S.Ct. 1974 (1974).

In April of 1975 a joint application on behalf of all four defendants (King, Talerico, Zogby and Mazza) was filed under 28 U.S.C. §2255. The Government filed a response in May of 1975 and the motion was denied in September of 1975 by Honorable Lloyd F. MacMahon, the trial judge.

On January 7, 1977, a motion pursuant to 28 U.S.C. §2255 was filed by petitioner King and on January 13, 1977, Honorable Lloyd F. MacMahon ordered the United States to respond to petitioner's motion within thirty days of service upon the Government. On February 1, 1977, the United States filed a motion to enlarge its time to answer petitioner's motion and by letter dated February 8, 1977, petitioner's counsel consented to an enlargement of the Government's time to respond subject to the Court's approval. On February 10, 1977, Honorable Lloyd F. MacMahon, based on petitioner's consent, extended the Government's time to respond to petitioner's motion to and including March 21, 1977.

In essence, the petitioner raises two claims in this petition which he alleges have not been presented to this court in any prior habeas corpus application and which he alleges have not been passed upon in direct appeal from the trial conviction. The two claims are (a) one or more trial jurors were exposed to prejudicial extra judicial information and (b) defendant was unnecessarily subjected to excessive physical force which prevented him from attending his own trial. Petitioner claims that these events violated his 5th and 6th Amendment constitutional rights.

The Government will respond to all points presented in petitioner's motion but will, in the interests of avoiding repetitive argument, combine responses to petitioner's points.

## GOVERNMENT'S RESPONSE TO PETITIONER'S FACTUAL STATEMENT

Prior to the "brief review of the known facts" which begins on page 28 of petitioner's motion, an extensive "Statement of Facts" is set forth beginning on page 8 and extending for some 20 pages. It is respectfully contended that petitioner's "Statement of Facts" is replete with characterizations and distortions that are at complete variance with the extensive files and records of this case, including the jury verdict and the affirmation by the Court of Appeals.

Petitioner for example:

1) characterizes J. Schuyler Sackman as a "recipient" of an extortionate extension of credit and refers to "criminal statutes alleged to have been involved herein . . ." (emphasis added) Motion pp. 9 and 10. The evidence indicates, and the jury found, that Sackman was a victim and that the statutes were violated.
2) refers to Sackman "instigating" a loan to himself--while an informant and "cunningly inter[weaving] petitioner King into the prosecution". Motion p. 9. The jury verdict expressly rejected this view.
3) refers to ". . . the Government's tactics in permitting and encouraging Sackman to ensnare petitioner" (emphasis added) Motion p. 11. The trial jury rejected King's defense that he was "ensnared".

4) characterizes the jury deliberation of approximately 24 hours excluding time for sleep and meals as ". . . caus[ing] the jury difficulty in arriving at its verdict (emphasis added) Motion p. 11. In view of the number of defendants and the length and complexity of the trial, such a characterization is baseless.

5) refers to newspaper accounts of ". . . an event which allegedly occurred on the prior evening" and states that petitioner "allegedly had sought to throw a live hand grenade . . ." (emphasis added) Motion p. 11. To assure that the record is crystal clear, at the trial a hearing was held in which it was established that the "event" did occur and petitioner did indeed throw a hand grenade. (Appendix 121, 122)

The Government contends that this benign, novelistic version of the "facts" is completely refuted by the files, transcripts and records of this case. It cannot and should not be accepted on its face by this court. The petitioner's subsequent indictment and his plea of guilty coupled with the extensive documentation of these "incidents" show conclusively that petitioner's version conflicts totally with the extensive records of this case.

Beginning on page 28 of petitioner's motion, he sets forth "a brief review of the known facts" allegedly based on the records of the case. The Government respectfully submits that once again, this "brief review" version of "the facts" is in such variance with the records, transcripts and files of the case that it cannot and should not be considered by this court. Petitioner's version of the "known facts" is totally distorted, slanted and fraught with error when compared with the extensive records and files of the prior proceedings in this matter.

Petitioner's motion is replete with statements concerning the possible existence of certain facts and statements about which, according to petitioner's version, there can be "no doubt". It is respectfully contended that these "possibilities" are just that; possibilities totally unsubstantiated and therefore meaningless.

The conclusions that petitioner draws can be totally rejected through examination of the records, files and prior proceedings in this case alone.

Petitioner, for example, states that:

> the possibility exists that the jury received first hand knowledge (emphasis supplied) Motion p. 29
>
> . . . It may have been possible for a person to see . . . some of the police cars that arrived . . . (emphasis supplied) Motion p. 33
>
> It was possible for the jurors to overhear conversations of patrons who may have been seated nearby (emphasis supplied) Motion p. 34
>
> . . . the possibility that if a juror had some reason to make an inquiry at the desk, it might have been possible . . . (emphasis supplied) Motion p. 34

The Government contends that the assertion of these "possibilities" amounts to sheer unsubstantiated speculation, without foundation in fact. Therefore, it is unworthy of consideration by this court.

Petitioner refers to selected portions of the trial transcript which must, to obtain a proper perspective, be supplemented by the entire trial record. A view of the entire record shows that the trial of petitioner and three others was, from the very outset, complicated by many deliberate attempts to cause mistrials and create havoc. There are, in the record, allegations concerning threats on the life of petitioner's trial counsel, evidence of attempts to bribe jurors, evidence of attempts to suborn perjury, evidence of attempts to kill the principal Government witness and evidence of an attempt to murder an FBI agent involved in the investigation. To be sure, this was not a simple prosecution of a few defendants for violating some federal statutes.

Petitioner in his "Statement of Facts" refers to four areas of the trial that have been completely and fully litigated at trial level, and direct appeal. These four areas concern:

a) medical condition of petitioner--request for continuance of trial. Motion pp. 12, 14

b) allegations concerning exposure of jury to publicity. Motion p. 13

c) King's absence from the trial. Motion pp. 15, 16, 17 and 20

d) presence of deputy marshals in the courtroom. Motion p. 18

As is demonstrated by the briefs filed with the Court of Appeals, all of these issues have been previously litigated and petitioner has been uniformly unsuccessful.

We make one final comment on petitioner's factual statements about the existing record. Petitioner begins, on page 28 of the motion, by saying that he ". . . became involved in an incident with FBI and local law enforcement officers . . ." It is never stated, through careful avoidance of the issue, how, and more importantly, why he "became involved". Indeed, this benign characterization of his act of violence in attempting to murder an FBI agent cannot be reduced, by any stretch of the imagination, to a mere "incident".

Petitioner did not "become involved"--he voluntarily willfully, knowingly and with premeditation visited the home of an FBI agent, smashed a living room window, and threw a hand grenade through the living room window. Petitioner characterizes this cold-blooded act of violence as an "incident". Petitioner, of course, has admitted possession of this hand grenade and in his plea of guilty to that charge admitted the facts and circumstances surrounding his possession of this destructive device.

Petitioner in his "summary of this event", focuses on what occurred in the minds of individuals other than petitioner. The Government contends that such a view is meaningless, mainly because it adds no new facts to this application and secondarily because it dwells on meaningless speculation. Because petitioner's "version" of the facts does not contain any new competent evidence it should be rejected by this court.

Petitioner's "Point Ten" presents a threshold issue--the disqualification of the Honorable Lloyd F. MacMahon. The Government will respond to that contention first.

## RESPONSE TO PETITIONER'S POINT TEN

## DISQUALIFICATION OF THE HONORABLE LLOYD F. MACMAHON IS NOT REQUIRED OR APPROPRIATE

The affidavit submitted by petitioner is not sufficient within the meaning of 28 U.S.C. §§144, 455, and does not require the District Judge to disqualify himself.

Due to the inherent disruption of the judicial process involved, the sufficiency of affidavits of disqualification must be strictly scrutinized. United States v. Womack, 454 F.2d 1337, 1341 (5th Cir. 1972). This is especially true when the affidavit is presented in a 28 U.S.C. §2255 application. An important purpose underlying Section 2255 is to make use of the trial judge's familiarity with the proceedings when deciding attacks on convictions. Mirra v. United States, 379 F.2d 782, 788 (2d Cir. 1967), cert. denied, 389 U.S. 1022 (1967). Disqualification of the trial judge in a Section 2255 proceeding is completely antagonistic to this purpose.

Disqualification based on the trial judge's status as a potential witness is completely premature at this stage. Only if it is determined that a hearing on petitioner's 2255 application is required, and only if the judge's testimony will be material and relevant to the issue on which the hearing is granted, will his Honor's status as a witness become material. Panico v. United States, 412 F.2d 1151, 1156 (2d Cir. 1969), cert. denied, 397 U.S. 921 (1970). Recusal prior to that time is not required in any Circuit and has, as its sole effect, a loss of judicial resources associated with assigning a new judge unfamiliar with the proceedings.

Petitioner asserts that the Trial Judge's refusal to poll the jury regarding exposure to extra-judicial information evidences personal bias. Additionally, petitioner contends that the variation in sentence between himself and the other defendants proves personal bias. In fact, these decisions during the course of the proceeding are no more than rulings adverse to the petitioner which clearly are not grounds for recusal. Ex parte Am. Steel Barrel Co., 230 U.S. 35, 44 (1913); United States v. Schwartz, 535 F.2d 160, 165 (2d Cir. 1976). Although the defendant's 20 year sentence cannot realistically be characterized as severe since a sentence up to 140 years was possible, even imposition of a severe sentence, if within legal limits, does not establish personal bias or prejudice. Knapp v. Kinsey, 232 F.2d 458, 466 (6th Cir. 1956).

The Trial Judge's comment at sentencing, that the evidence shows the petitioner to be vicious and violent, does not show personal bias, United States v. Sclafani, 487 F.2d 245, 255 (2d Cir. 1973); and, moreover, is amply supported by the trial record, which showed defendant King was the most culpable of all the defendants. The trial record showed, and the jury decision accepted, that King arranged the violent brutality that was used to extort the loan repayments from the victim while King pretended to be the victim's friend. Perceptions obtained by a judge, based upon what he has learned through judicial participation in the case, cannot amount to disqualifying bias or prejudice. United States v. Grinnell Corp., 384 U.S. 563, 86 S.Ct. 1698 (1966). United States v. Womack, 454 F.2d 1337 (5th Cir. 1972), which petitioner cites in his petition, is not to the contrary. In Womack the court relied on two affidavits. The first recited the Judge's statement that everybody admitted defendant was a shady character. The second, and most important for purposes of the recusal request, indicated that in a pretrial conference the Judge stated that "the court was convinced appellant was guilty." 454 F.2d at 1341. Womack does not support disqualification based upon an isolated comment by the Trial Judge on the evidence.

In Womack, of course, the comments by the Trial Judge were made prior to the trial of Womack and could be viewed as a preconceived notion of the defendant's guilt. In the context of this petition, the Trial Judge's comment was made after a long trial and upon sentencing of Mr. King some three months after trial. The Trial Judge had the benefit of a complete detailed presentence report and the benefit of a hindsight view of the entire trial. His comment on the evidence at that stage of the proceedings was completely justified.

It should be noted that both petitioner and his trial counsel had full opportunity to dispute Judge MacMahon's statement about the trial evidence and both failed to dispute the Judge's statement in any manner. Now some three and one-half years after sentencing and almost four years after trial, petitioner attempts to rely on a single comment on evidence, by a trial judge, after a lengthy trial. The Government contends that his reliance is totally misplaced. Furthermore, our research has disclosed no case in this Circuit where a judge's language during the course of a judicial proceeding has been so jaundiced as to require his recusal.

> The rule of law, without belaboring the point, is that what a judge learns in his judicial capacity--whether by way of guilty pleas of codefendants or alleged coconspirators, or by way of pretrial proceedings, or both--is a proper basis for judicial observations, and the use of such information is not the kind of matter that results in disqualification. United States v. Bernstein, 533 F.2d 775, 785 (2d Cir. 1976)

The failure of the trial judge to remove petitioner's name from the prior petition, pursuant to 28 U.S.C. §2255, does not show personal bias. Although the trial judge is charged with knowledge of petitioner's request, assuming it was in the file as alleged, there is no allegation that the trial judge was, in fact, aware of said request. Without an allegation of such actual knowledge the assertion of bias resulting therefrom has no factual basis as required by Section 144. However, even if such an allegation were present, it merely amounts to a claim of error not cognizable in a Section 144 claim. Ex parte Am. Steel Barrel Co., supra.

Petitioner alleges that the letter forwarded to the Clerk of the Court "is likely to prejudice Judge MacMahon's view of the petitioner." Petition at 62. The letter is innocuous, merely containing an interpretation of law, and it is unsigned. No bias or prejudice could result from such a letter even if it were signed and sent by the petitioner. United States v. Birrell, 276 F. Supp. 798, 809 (S.D.N.Y. 1967). It is simply nonoffensive.

## RESPONSE TO PETITIONER'S POINT ONE - "A"

Petitioner asserts that Patterson v. Colorado, 205 U.S. 454, 462 (1907) is support for a finding of presumptive prejudicial publicity. While the proposition set forth by Justice Holmes in Patterson v. Colorado cannot be disputed, the proposition is a general rule of the widest possible magnitude and simply sets forth the optimum manner in which our jury system should function.

In Remmer v. United States, 347 U.S. 227, 229 (1953) the court was faced with a direct communication to a trial juror which could easily have been interpreted by that juror as a bribe. In addition to that prejudicial statement there was a complete FBI investigation of the incident in the midst of the trial. This the court concluded, interfered with the juror and impeded the jury thus jeopardizing the integrity of the entire jury deliberation. It does not appear that any limiting instruction was given and the case was remanded for a hearing to determine the circumstances and impact of this event on the jury.

In United States v. Brasco, 385 F. Supp. 966 (S.D.N.Y. 1974), aff'd, 516 F.2d 816 (1975), decided some one and one-half years after petitioner King's trial, the trial court held a hearing based on the directive of United States v. Rattenni, 480 F.2d 195 (2d Cir. 1973), also decided subsequent to petitioner's conviction. Brasco, of course, involved numerous instances of particularly egregious jury misconduct and in addition to the eight instances mentioned in footnote 2 at 385 F.Supp. 969, the court specifically focused on the alleged reading of a newspaper article concerning the trial in progress. Brasco on its facts is distinguishable from the instant petition since the motion for a new trial was made shortly after the original trial. In this case, petitioner raises, some four years after trial, a highly suspect, vague, weakly supported allegation that a trial juror was exposed to prejudicial publicity and asks for the same relief as if this allegation were raised during trial. Indeed the rule announced in Remmer v. United States is not questioned, but, it is respectfully submitted that petitioner has not made a sufficient showing of prejudicial newspaper articles being read or for that matter newspaper articles being read by the sequestered trial jury to allow this Court to order a hearing.

In Marshall v. United States, 360 U.S. 310, 79 S.Ct. 1171 (1959), extremely prejudicial newspaper articles concerning the defendant were read by a substantial number of jurors. The Supreme Court held that a new trial was necessary. But, Marshall was a case where the articles were extremely prejudicial and, in addition, were seen or read by seven trial jurors. That case cannot be compared to the instant case, where an allegation is being made by a vague check marked (✓) form that one trial juror had allegedly seen newspaper accounts of the trial. Marshall, of course, involved a situation that was raised during trial, completely unlike the situation in the instant petition where the allegation is raised some four years after verdict.

The Second Circuit in United States v. Brasco, 516 F.2d 816 (2d Cir. 1975), asserts the two rules concerning private communications to a jury--one rule requiring a showing of prejudice to the defendant and the other rule raising a presumption of prejudice. It is respectfully contended that the purported statement of Mrs. Helen Postal does not fall within either of these rules. The purported statement of the juror, Mrs. Postal, does not state, affirmatively or otherwise, that she read news articles concerning the case on trial--it merely shows a check-marked space which could easily have been mischecked. The affidavit of Michelle Malina does not state that Mrs. Postal stated these facts to her.

The Malina affidavit is incompetent hearsay and is completely conclusory on the crucial point of whether Mrs. Postal stated that she read newspaper accounts of the trial and whether Mrs. Postal stated that she saw television coverage of the trial. The record in this case and the instant motion make clear that any juror would say he or she was "aware of why the defendant was in the hospital." The Court specifically told them that King had been injured over the weekend. The obvious ambiguity in the date the trial resumed, the failure to state the alleged circumstances under which the statement of Mrs. Postal was obtained, and the date of this affidavit--some three years after the trial--should persuade this court to give very little or no weight to the Malina affidavit.

In *United States* v. *Rattenni*, 480 F.2d 19[illegible] (2d Cir. 1973), the facts were similar to *Marshall* v. *United States* since six jurors heard a radio broadcast during the trial and one juror also read a newspaper article that, she confessed, prejudiced her against the defendant. In *Rattenni* the trial juror readily and clearly admitted prejudice and the Second Circuit concluded, because of this, that the entire verdict was tainted. The holding that the verdict must be set aside where "even one juror in effect admits prejudice . . .", 480 F.2d at 198, is based obviously on the facts in *Rattenni*, that the juror "readily admitted her prejudice against *Rattenni* on the remaining charges." 480 F.2d at 196.

The alleged juror statement in the instant petition does not, in any way, rise to the level of the expression of juror prejudice found in *Rattenni*. There is obviously no expression of prejudice from the alleged juror statement and the Government contends, because of the patent defects in the statement itself, (incompetent hearsay, conclusory, misleading, without explanation of how it was obtained), that the statement does not fall within the rule mandating a finding of presumptive prejudice.

Here, of course, the allegation of a private communication to a juror does not come during trial, or days or weeks after trial, but comes suspiciously, some four years after verdict. This point also overlooks the most critical distinction; this was the direct foreseeable consequence of King's own deliberate conduct and not some outside force over which he had no control.

113

## RESPONSE TO PETITIONER'S POINT ONE - "B"
## HIS REQUEST FOR A HEARING

Petitioner cites Machibroda v. United States, 368 U.S. 487 (1962), for the proposition that he is entitled to an evidentiary hearing as to the factual issues raised by the purported juror's statement and the alleged statements of Mr. Wakeel. As any reading of Machibroda shows, the affidavit in support of the 2255 motion in that case was extremely detailed, extremely lengthy, and set forth a multitude of specific factual allegations giving names, dates, times and places.

Here, of course, there is no such affidavit. The purported statement of Mrs. Postal (Appendix p. 307) is hopelessly vague--it is in questionnaire form, unsworn, and is ambiguous--and lacks detail as to every important fact. The purported statement is clearly insufficient when it states that " I did make or I did receive one or more telephone calls" and "As best as I can remember." The statement was obviously prepared with blank spaces and cannot be said to be the juror's own statement when it contains easily misplaced check marks where crucial detailed facts should appear. The statement contains handwriting in only one paragraph out of the eight--the handwriting there being simply the name of the juror. The statement is, at best, confused, ambiguous and exceedingly vague. In Machibroda the files and records in the trial court were practically nonexistent, since the conviction was based upon a plea of guilty. In contrast, the conviction in this case is based upon a full trial in which the defendant King put in a defense that was obviously rejected by the jury. There can be no comparison between the factual background of Machibroda and the factual background of the instant petition. Machibroda contained a strong dissent by Justices Clark, Frankfurter and Harlan, but even the majority opinion at 496 states that the basis of their opinion is

> the specific and detailed factual assertions
> of the petitioner

which is highlighted and mentioned throughout the majority opinion. The majority opinion in Machibroda is very clear that the basis of their opinion is that

> The petitioner's motion and affidavit contains charges which are detailed and specific. (368 U.S. at 495).
>
> On this record it is his right to be heard. (emphasis added).

With equal force the majority in Machibroda declares that

> The language of the statute does not strip the district courts of all discretion to exercise their common sense. (368 U.S. at 495),

and the ruling in this case does not imply that the record must conclusively contradict a petitioner's claims in order for a trial judge to deny a full hearing.

The Government contends very simply that the alleged statements which form the bases of petitioner's claims in this motion are incompetent hearsay, hopelessly vague, patently confusing, and insufficiently detailed to support any action by the trial court at this stage of post-trial proceedings.

Petitioner cites United States v. Valenciano, 495 F.2d 585 (3rd Cir. 1974), as standing for the proposition that he is entitled to a hearing on his 2255 application. The facts in Valenciano are very similar to Machibroda in that both involved a guilty plea rather than a trial, both involved extremely bare records or transcripts and both involved matters outside the record. The Government respectfully contends that any reliance on Valenciano is misplaced for the same reasons stated under our view of Machibroda.

Petitioner claims that the only evidence in the record concerning the insulation of the jury from the publicity of the shooting incident is the fact that the jury was sequestered. Petitioner ignores the evidence in the record that the Court, at each recess, admonished the jury sternly not to read newspapers, view television coverage or talk about the case. The Court coupled that admonishment with a threat of contempt of court for disobedience. (Appendix, p. 23 --reproduction of trial transcript, p 208). It is respectfully contended that this is more than ample evidence that the jury did not learn about the shooting incident, since the alleged statements by Mrs. Helen Postal, Michelle Malina, and the hearsay declarations of Mr. Wakeel are, for the reasons stated, patently insufficient to show otherwise.

Petitioner cites *Gafford* v. *Warden*, 434 F. 2d 318 (10th Cir. 1970), in which a 2255 application was filed based upon an *affidavit* of a juror indicating that one or more jurors deliberately conducted their own investigations, beyond the trial evidence, about two facts which apparently were critical in the jury deliberations. A hearing on a motion for a new trial was held but at the hearing the Court ruled that the defendant's attorney could not question the jury concerning these allegations. The court concluded that the affidavit was incomplete, that its truthfulness was suspicious and that the jury had been instructed on numerous occasions to consider only evidence presented in open court. The Court of Appeals reversed this holding and remanded the case because "questions of fact were disposed of without an evidentiary hearing." The holding of the Circuit Court is based clearly on the fact that it considered the specific, detailed allegations of prejudicial, extra-judicial information contained in the juror's affidavit worthy of a hearing. The Appellate Court ruled that the allegations presented in the juror's *affidavit* were specific and detailed enough to warrant a hearing.

Here, of course, there is no juror affidavit and, as is patently obvious, the purported statement of a juror lacks specificity, lacks essential detail, is in unacceptable questionnaire form and is ambiguous when it refers to alternative fact situations, e.g., "I did make *or* I did receive one *or* more telephone calls ... " (emphasis supplied). The purported juror statement is clearly unreliable as exemplified by the statement that "...trial resumed on Tuesday, the 27th of February, 1973 ...". The record indicates that trial resumed on Monday, February 26, 1973. The juror statement appears to be dated some 2-1/2 years after the jury verdict. It is respectfully contended that the passage of 2-1/2 years cannot render recollections about a trial reliable, in that the news events immediately after the trial could be easily confused with news events occurring during the trial.

The record shows that the court had before it evidence that the defense would attempt to influence the trial jurors during the trial. Those attempts were completely frustrated when the jury was sequestered. A hearing now, some 4 years after trial, would only subject those jurors to new dangers for no good reason. The instant motion does not make a sufficient showing that a hearing is required when weighed against the danger that someone with an interest in the outcome of this case may, once again, attempt to reach a juror and especially when balanced against the fact that the matter is the result of this defendant's own deliberate criminal conduct.

## RESPONSE TO PETITIONER'S POINT TWO

Petitioner claims that the hearsay statements of Mr. Wakeel, as related to petitioner's counsel, together with the purported juror statement, constitutes a sufficient showing to mandate an evidentiary hearing under 28 U.S.C. §2255. This the Government contests on the following grounds.

It is true that where a motion for relief under 28 U.S.C. §2255 is sufficiently supported, summary rejection is improper. Taylor v. United States, 487 F.2d 307 (2d Cir. 1973). It is no less certain, however, that the decision of a District Judge to deny an insufficient motion without a hearing is a matter properly within his discretion. Machibroda v. United States, 368 U.S. 487, 495 (1962); Accardi v. United States, 379 F.2d 312 (2d Cir. 1967); Mirra v. United States, 379 F.2d 782 (2d Cir. 1967). This is just such a case. Here, the petitioner's motion is recommended by a recitation of the hearsay conclusions of Mr. Wakeel and the unsworn purported statement of a juror and affidavit of an alleged witness to the "statement". In Simmons v. United States, 354 F.Supp. 1383, 1386 (N.D.N.Y. 1973) (MacMahon, J.), the court rejected similar assertions as insufficient, and in affirming, the Court of Appeals for the Second Circuit announced that

> Mere generalities or hearsay statements will not normally entitle the applicant to a hearing, since such hearsay would be inadmissible at the hearing itself. (citations omitted). The petitioner must set forth specific facts which he is in a position to establish by competent evidence. Machibroda v. United States, 368 U.S. 487, 495-496 (1962).

Dalli v. United States, 491 F.2d 758, 760-761 (2d Cir. 1974).

The unreceptiveness to hearsay assertions in [illegible] of section 2255 motions is apparent in several decisi[illegible] E.g., United States v. Pisciotta, 199 F.2d 603, 607 (2d Cir. 1952);

United States v. Catalano, 281 F.2d 184 (2d Cir.), cert. denied, 364 U.S. 845 (1960); D'Ercole v. United States, 361 F.2d 211 (2d Cir.), cert. denied, 385 U.S. 995 (1966).

In D'Ercole, supra, the petitioner offered an affidavit of a prisoner relating a conversation the prisoner allegedly had in prison with petitioner's co-defendant at trial, in which the latter purportedly admitted that he had been coerced by federal agents to implicate the petitioner and testify against him at trial. The Court of Appeals acknowledged that the declarations, if true, would entitle the petitioner to relief under section 2255 for the denial of his Fifth Amendment right to due process, yet the Court affirmed the District Court's denial of the application without a hearing. It reasoned as follows:

> The difficulty is that the affiant's statement of what [the co-defendant] said does not qualify as proper evidential material to support a petition under §2255 because it is hearsay and could not be used at a hearing.

361 F.2d at 212.

There is nothing here which imparts particular reliability to the hearsay statements of Mr. Wakeel or the purported statement of the trial juror, or which in any other manner excepts it from the reasoning of the cases cited. Indeed, the circumstances which the memory of Mr. Wakeel allegedly reconstructs are over three and one half years old. As petitioner has not shown that he has "actual proof of the allegations going beyond mere unsupported assertions," Barry v. United States, 528 F.2d 1094, 1101 (7th Cir. 1976), the Government respectfully submits that a hearing should be denied him, as should any attempt to obtain an order to depose Mr. Wakeel.

"Section 2255 does not grant an absolute right to an evidentiary hearing." Patrick v. United States, 310 F.Supp. 1267,

1-9

1269 (E.D.Mo. 1970), nor does the "language of the statute strip the district courts of all discretion to exercise their common sense." __Machibroda__ v. __United States__, 368 U.S. 487, 495 (1962). Here, the "evidence" proferred by the petitioner is wholly speculative and conclusory, and would not entitle him to relief even if proven. Petitioner's application should be denied without a hearing. __Burris__ v. __United States__, 430 F.2d 399, 402 (7th Cir. 1970); __Cardarella__ v. __United States__, 375 F.2d 222, 230 (8th Cir. 1967); __Tropiano__ v. __United States__, 323 F.Supp. 964 (D.Conn. 1971).

28 U.S.C. §2255 specifically provides that the motion may be denied without a hearing if the motion, files, and records of the case conclusively show that the prisoner is entitled to no relief. See __Fontaine__ v. __United States__, 411 U.S. 213, 215 (1973). In the instant case, the trial court immediately ascertained at trial that the jury did not hear of the incident around which petitioner's claim centers. (Trial Tr. p. 661), and was assured by the U. S. Marshal that nothing improper had transpired. What is more, the Court sternly admonished the jury on nine different occasions not to talk with others about the case or to allow themselves to be exposed to any media coverage of any kind concerning the case. (Tr. pp. 207-208, 477, 595, 654, 742, 814, 859, 961, 1025). And the jury was, of course, sequestered in the first place to avoid this very problem. (Tr. p. 12).

It would be irresponsible to assume that the jury did not heed the judge's admonitions, __United States__ v. __Marshall__, 458 F.2d 446, 452 (2d Cir. 1972), particularly on the basis of unreliable hearsay speculation. Rather, when a trial judge assures himself that charges of deliberate disregard of their sequestration and the court's admonitions by the jury are improbable or unlikely, at the least, this conclusion from his knowledge of the trial and the conduct of the jury therein is entitled to respect. Burris v. United States, 430 F.2d 399 (7th Cir. 1970), cert. denied, 401 U.S. 921 (1971). Indeed, it has been acknowledged that the purpose of presenting a motion pursuant to section 2255 to the trial judge is so that he can make use of his personal knowledge of trial occurrences in passing on claims for relief based on such occurrences. Mirra v. United States, 379 F.2d 782, 788 (2d Cir. 1967) (citing United States v. Smith, 379 F.2d 49, 53 (4th Cir. 1964), cert. denied, 381 U.S. 915 (1965)); Panico v. United States, 412 F.2d 1151, 1155-1156 (2d Cir. 1969).

Our conclusion that the trial judge correctly determined that the perceptions of the jury were not sullied by improper information is bolstered by the manner in which they deliberated their verdict. After receiving the case before noon on Wednesday, February 28, 1973, (p. 1003, they deliberated until 10:30 p.m. that evening (p. 1026) and continued the following morning until their verdict was delivered at 12:15 p.m. on Thursday, March 1, 1973. Not only was the jury's consideration of the case extensive, but they exhibited great care in their analysis, requesting tapes to be reheard as well as the Court's charge on Cout I. In the face of evidence pointing so forcefully to the guilt of the defendant (p. 1083), such care in deliberation irresistably suggests that the jury proceeded cautiously and properly and was in fact ignorant of what had transpired over the weekend. It is clear, then, that a review of this motion, and the files and records of this case, conclusively demonstrates that the jury was not prejudiced by improper information. The petitioner, therefore, is entitled to no relief, and his request for a hearing or, alternatively, for an order directing Mr. Wakeel to submit to a deposition, should be denied.

The Government also contends that this motion should be denied in all respects because the issues have already been exhaustively litigated and the present motion raises no new evidence of material significance.

At trial, on motion of defense counsel, the court heard arguments and determined that no voir dire or evidentiary hearing was necessary in view of its knowlege of the facts and the posture of the trial. On appeal, United States v. King, 486 F.2d 1397 (2d Cir. 1973), the same counsel pursued the same questions regarding a possible mistrial and the necessity for a voir dire hearing--and was again unsuccessful. Ultimately, the United States Supreme Court denied certiorari. 416 U.S. 958 (1974). Finally, and most significantly, only last September this court rejected an application for relief under section 2255 premised on an affirmation of defense attorneys comprised of the hearsay statements of Mr. Wakeel. The court held that speculation and conclusory declarations such as Mr. Wakeel's were insufficient to require a hearing, and that even assuming their evidentiary competence, the contentions they allegedly supported were defeated repeatedly in prior litigation and could not be raised again.

There is some question whether King effectively removed himself from this last application for post-conviction release; but whether he did or not is of no real importance. The recollections of Mr. Wakeel represent nothing that is significantly new or material; they are merely "cumulative" and patently inadequate to upset petitioner's conviction. Panico v. United States, 412 F.2d 1151, 1155 (2d Cir. 1969); Tropiano v. United States, 323 F.Supp. 964, 966 (D.Conn. 1971). The arguments that the jury might have learned of the weekend incident involving the petitioner were raised at trial, but the judge admonished the jury and satisfied himself that they in fact remained unaware of the incident. Again on appeal arguments were heartily urged and were again denied. [Mr. Wakeel's statements do not intimate that the jurors actually saw or heard any media account of the incident or any conversation relating to it or in any other way provide any new critical evidence of jury prejudice.] In short, unless a motion under section 2255 is to serve as [illegible] vehicle for the relitigation of issues previously settled, the hearing and deposition requested should be denied. Dalli, supra, at 761; Panico, supra; Williams v. United States, 334 F.Supp. 669 (S.D.N.Y. 1971), aff'd., 463 F.2d 1183 (2d Cir. 1972), cert. denied, 409 U.S. 967 (1972). In addition, as the declarations of Mr. Wakeel proferred here differ in no material respect from those considered on the previous section 2255 motion, this matter has itself been effectively litigated. See Ormento v. United States, 328 F.Supp. 246, 259 (S.D.N.Y. 1971).

During the trial, this court held a hearing to determine the voluntariness of the petitioner's criminal conduct and found it to be voluntary. (Tr. pp. 1069, 1074-1087). That King subsequently entered a guilty plea to the possession of an unregistered hand grenade in violation of 26 U.S.C. §5861(d) and 5871, one of the charges issuing from the weekend incident, only serves to underscore the correctness of the court's ruling. To allow him now to realize a new hearing as the fruit of his act of deliberate, criminal violence would be an affront to a basic sense of justice. "The language of the statute does not strip the district courts of all discretion to exercise their common sense." United States v. Franzese, 525 F.2d 27, 32 (2d Cir. 1975), quoting, Machibroda, supra, at 495.

Petitioner's reliance on United States v. Eagle, 539 F.2d 1166 (8th Cir. 1976), is misplaced. Eagle involved a hearsay assertion that one juror knew prejudicial information about

123

the defendant and that therefore extraneous prejudicial information was present in that juror's mind. There was no contention that the juror voiced the prejudicial information he allegedly possessed to any other juror and the Government submitted the affidavit of juror Long in which the juror denied "knowing" any prejudicial information. The juror admitted "speculating" about defendants involvement in an unrelated offense but the juror denied discussing his speculations and denied that the speculations affected his decision against the defendant. 539 F.2d at 1169.

Based on these facts, that the juror's speculations stayed in his own mind and did not affect his decision, the court in Eagle ruled that the defendant had no right to subpoena any of the remaining jurors. Eagle simply does not apply to the instant petition in any way and is authority for denying a hearing where the allegations are insufficient to impeach a verdict and where incompetent hearsay allegations are alleged. Eagle does not support petitioner's request for an evidentiary hearing.

In United States v. McKinney, 429 F.2d 1019 (5th Cir. 1970) the Fifth Circuit remanded the section 2255 application for a hearing based on the factors that members of the trial jury recalled newspaper stories concerning defendant's jailbreak and, most significantly, that the members of the jury had discussed the escape and the subsequent apprehension of defendant while in the jury room. The escape which was discussed in the jury room was, of course, an escape from jail while under indictment awaiting trial for the same charge that was brought to trial. While no affidavit of any juror was submitted in support of the post-trial relief, counsel filed papers asserting the two critical facts that the jurors (no number mentioned) knew of the jailbreak through newspaper accounts and

124

and discussed it during jury deliberations. It does not appear that the jury in the McKinney case was sequestered.

In the Second Circuit counterpart of McKinney, United States ex rel. Owen v. McMann, 435 F.2d 813 (2d Cir. 1970), the court made a similar ruling based upon similar, but stronger, facts of extraneous prejudicial information infiltrating the jury room. The decision in Owen v. McMann was based upon the affidavits of two jurors and a hearing held by the District Judge. The affidavits and the hearing revealed that the jurors knew a great many prejudicial, extra-judicial facts about the defendant and most significantly that they discussed these matters during jury deliberations. The Court of Appeals held that, based on the nature of the prejudicial extra-record matters that "infiltrated" the jury room, the probability of prejudice was obvious.

Petitioner King's application does not fall within McKinney or McMann because of a number of important differences. Firstly, there is no affidavit of a juror--but rather a confused, highly suspicious, ambivalent questionnaire-type "statement".

Secondly, the purported juror statement is simply a prepared questionnaire and contains very little, if any, of the juror's own statements. The questionnaire merely contains easily misplaced check marks (✓) that indicate suspiciously and haphazardly that Mrs. Postal "read articles" concerning the case.

Third, the purported juror statement is so completely prepared that it contains only three words in the juror's own handwriting. It lacks essential detail as to every aspect of the circumstances surrounding the signing of the "statement".

Fourth, the purported statement of a juror does not state that anything that may have been learned was discussed with other jurors. The critical factor in both McKinney and

McMann was that the trial jury discussed the prejudicial information during deliberations. That factor is missing here.

Fifth, the purported statement of the juror comes long after the verdict, some two and one-half years, whereas in McKinney the motion was filed immediately after conviction, i.e., three days after conviction. In McMann precisely the same thing happened--counsel obtained affidavits from the jurors very shortly after verdict and presented them on sentencing.

Sixth, the purported statement contains a clearly erroneous statement in stating that the trial resumed on Tuesday, February 27, 1973. The record is indisputable that the trial resumed on Monday, February 26, 1973.

Seventh, the purported statement nowhere refers to defendant "King" explicitly and contains obvious misspellings in the handwritten words "Onieda" (sic)--a word too common to be misspelled by an Oneida County resident.

Eighth, the purported statement is vague and ambivalent when it refers to alternative fact situations and uses phraseology like "I did make or I did receive one or more telephone calls" and "As best as I can remember". The statement about knowing why defendant was in St. Luke's Hospital is completely logical and adds nothing.

Petitioner's papers do not fit the guidelines of either McKinney or McMann since, as stated above, the purported statement of the juror contains obvious error and patent dificiendes. The facts in McKinney demonstrate two crucial elements of jury infiltration that are absent from petitioner's paper; namely, prejudicial knowledge and use of the prejudicial knowledge during deliberation.

## RESPONSE TO PETITIONER'S POINT THREE

Petitioner further contends that the purported statement of juror Helen Postal compels a hearing at which both she and the other trial jurors may properly testify. We submit that due regard to the nature of the statement as well as its substance mandates the opposite conclusion.

In the first place, we have here not an affidavit from a juror, as in the case of United States ex rel. Owen v. McMann, 435 F.2d 813 (2d Cir. 1970), but simply a purported statement. Moreover, whereas in McMann affidavits from the jurors were obtained promptly after the verdict was rendered, here there was a disturbing lapse of some 2 1/2 years. Thus, in addition to lacking the trustworthiness of an affidavit, the proferred statement of Mrs. Postal presents information that is stale and susceptible to inaccuracy. At this date, it taxes the imagination to believe that the jurors have not by this time fully learned of the weekend incidents of violence. It is not improbable that at least a few of the jurors, perhaps including Mrs. Postal, would now be unable to place into proper perspective events that closely followed the trial. In short, after 2 1/2 years, Mrs. Postal's susceptibility to confusion or suggestion is too great to justify confidence in her purported statement.

The value of the statement is also called into question by its form. The paper is merely a checklist lacking any detail and offering equivocal information. And as will be discussed shortly, there is no implication that the information to which Mrs. Postal was allegedly exposed, whether benign or not, was ever communicated by her to other jurors. In addition, inspection of the purported statement reveals inaccuracies which test its credibility. First, the trial is said to have resumed and the court convened in St. Luke's Hospital on Tuesday, February 27, 1973. This is plainly incorrect as the record indisputably shows that the trial resumed on Monday, February 26, 1973. Second, Mrs. Postal, an Oneida County resident, on two occasions misspells the word "Oneida," and incorrectly writes

127

"Onieda" as her city of residence before striking it out. Third, though crossed-out, the name "Mrs. Helen Postal" was clearly signed in the jurat section indicating confusion and serves to underscore our doubts about the alleged statement.

Similarly [illegible] is the affidavit of Michelle Malina, witness to the signing of the purported statement, executed almost 8 months later on June 24, 1976. Once again the trial is said to have resumed on February 27, 1973. But much more compelling is the fact that though Malina swears that she re-signed the Postal statement on June 24, 1976 the two signatures are not even remotely similar.

On the basis of the foregoing, we submit that the purported statement of Mrs. Postal is not sufficiently trustworthy to serve as a basis for holding a hearing at which she would testify. To allow the testimony of a juror on the recommendation of such specious documents would be a subversion of public interest, central to the jury incompetency rule, in securing the integrity and finality of jury verdicts. See Fed. R. Evid. 606(b) and Advisory Committee Comments; McDonald v. Pless, 238 U.S. 264, 267 (1914); Government of the Virgin Islands v. Gereau, 523 F.2d 141, 148-149 (2d Cir. 1975), 423 U.S. (1976).

It is no less plain that the other jurors in this case are also incompetent to testify. With the exception of the conclusory hearsay statements of Mr. Wakeel to which we have already addressed ourselves, the petitioner has offered absolutely nothing to show that any of the jurors other than Mrs. Postal was exposed to extraneous information possibly prejudicial to the petitioner, either within or outside the courtroom. The purported statement of Mrs. Postal does not directly state, or in any way intimate, that the other jurors were exposed to extraneous information either through conversations with Mrs. Postal or independent of her. Whatever "hint" to the contrary might conceivably be found could not in itself constitute good cause to hold a hearing. See United States v. Mitchell, 389 F. Supp. 917, 918-919 (D.D.C. 1975).

This is not a case where it is alleged that extraneous information actually infiltrated into the jury room, see Mattox v. United

States, 146 U.S. 140 (1892). (Newspaper editorials prejudicial to the defendant read to the jury in the jury room.) There being absolutely no indication of such contamination here, it would fly in the face of the rule of juror incompetency to permit these jurors to testify. The assurances which the rule seeks to provide against jury harassment and the stability and finality it seeks to impart to verdicts would be undermined if verdicts were to be subject to attack, and jurors called to testify on such baseless grounds.

After having been sequestered for two weeks and having deliberated this case carefully, the jury may fairly be said to have performed its civic duty. In addition, as this court is aware, attempts to reach the jury were considered before trial (e.g. tr. at 1048, 1082, 1086). To hold a hearing now on the basis of petitioner's patently insufficient showing would only serve to expose the jurors to further anxiety and, conceivably, additional threats. Moreover, four years have passed since the trial, and unquestionably the jurors recollections will be hazy and susceptible to manipulation.

Thus we submit, that the petitioner has not made a sufficient showing to necessitate a hearing, that the jurors may not properly be summoned to testify, and that this motion pursuant to Section 2255 should be denied on the basis of the files and records of the case.

129

## RESPONSE TO PETITIONER'S POINT SEVEN

Petitioner claims that he successfully withdrew from the prior 2255 motion and that he was not a proper party to the earlier motion. This, he argues, should not bar his present 2255 motion.

Regardless of whether he properly withdrew from the earlier motion however, the entire record, including KING'S exhibits on this application, demonstrate his abuse of the process and his present application should be denied.

In Sanders v. United States, 373 U.S. 1, 18 (1963), the Court stated:

> ... if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground.

The Court goes on to say, federal courts should not tolerate this kind of piecemeal litigation.

In light of this, the Government submits that this present petition should be denied because King's own letter (A. 290) makes clear the whole thing was a bungled attempt to abuse the process and conduct piecemeal litigation.

> "Lou, our understanding was that a sort of affirmation hearing was to be held with either Jimmy or Jack as the party.
>
> * * *
>
> I also prefer that the Court and the U. S. Attorney's Office remain in the dark as to my intention on future legal process."
>
> (Petitioner's Appendix, Volume II, A-290).

It is clear KING wanted the others to file first without him and then after seeing the results of their motions, he could file a successive motion in violation of the successive motion prohibition and thereby cause the kind of piecemeal litigation this Court should not tolerate. On this basis alone, this Court can deny this application without further proceedings.

Assuming that Petitioner did withdraw his earlier application, the petitioner's "Point Seven" admits that the present application contains very little that is new and, we submit, nothing that requires any different disposition. The first additional ground advanced -- that of an "executed and witnessed statement of a juror ... ", has been discussed in the Government's response to Points one, two, and three of the instant motion. The Government contends very simply that the purported juror statement, which is obviously a questionnaire of some type, is defective and insufficient on its face.

Even assuming petitioner did successfully withdraw his initial application, the second additional ground advanced; namely, the "unnecessary use of deadly force", has been completely litigated in direct appeal to the Second Circuit and was rejected by that Court. See brief of appellant KING--Point VI, and brief of UNITED STATES -- Point I, filed with the Second Circuit Court of Appeals, Petitioner's Appendix pp. 191-194 and pp. 201-204, respectively. As stated in our response to point eight of the petitioner's motion, infra, the argument of "excessive force" as opposed to "force" is simply an embellishment of a specious argument previously rejected.

131

## RESPONSE TO PETITIONER'S POINT EIGHT

Petitioner claims that his appeal to the Second Circuit did not cover the contention that he was denied confrontation of the witnesses against him and thereby deprived him of his Sixth Amendment rights. The Government disagrees--Petitioner, at page 191 of the Appendix to this motion, reproduces his appellate brief. Point VI of petitioner's appellate brief covers precisely the contention that he was denied access to his trial. This contention was answered in the Government's appellate brief and we must conclude that the Court of Appeals, in affirming petitioner's conviction, rejected petitioner's contentions.

The fact that petitioner in his appellate brief argued that he was "shot by members of the Federal Bureau of Investigation or the State Police" and that he now states that "excessive force" was used is of no moment. The crucial factor is that he was caused to be absent from his own trial, and the cause of that absence was his own willful, voluntary, criminal act to which he has pleaded guilty. The trial court in this case took a lengthy recess to allow King's counsel to prepare with King to conduct a hearing into this preuse issue and they refused to participate in that hearing which was held anyway. (Transcript pp. 1042-1043 and 1073) The trial judge's determination respecting King's conduct was affirmed completely. Again, his argument now is simply an embellishment of an argument previously rejected.

Petitioner also claims that the appellate court was not asked to consider the issue of actual exposure of jurors to publicity. Petitioner argued the issue of prejudicial publicity strenuously to the appellate court--See Appendix pp. 184-190 (reproduction of appellate brief). The issues of

a) the shootout at the motel

b) the presence of extra deputy United States marshals, and

c) the possession of newspapers by the jury were presented in King's appellate brief and were rejected.

Petitioner claims now that he has made a showing that a juror had actual exposure to prejudicial publicity. His showing is completely deficient since the purported questionnaire-type statement of a single trial juror is, on its face, insufficient.

## RESPONSE TO PETITIONER'S POINT NINE

Petitioner cites no case authority for the proposition he puts forth in Point Nine, at page 55, of the motion. Our research has not discovered any controlling federal statute or case law that would support the specific contentions petitioner makes. The entire argument set forth pivots on the contentions set forth in the King affidavit, especially paragraphs six through ten.

### The Basic Issue Has Been Litigated and Petitioner Has Waived His Right to Further Litigation

On page 57 of King's present motion, he admits that if his own willful actions prevented his attendance, then he waived that right to be present. This court has already litigated that question and gave King every opportunity to litigate whether it was his willful act. The trial court's ruling that it was petitioner's willful act, (See e.g., A 121, 122) has been affirmed all the way up to this nation's highest court. It is outrageous to suggest that 4 years later, on the basis of this flimsy application, this court should relitigate this whole issue.

Petitioner has had many opportunities to raise his allegation that he was "shot unlawfully" but has successively waived these opportunities. Petitioner could have raised this several times at trial but chose not to. Petitioner raised this in direct appeal to the Second Cirucit (Appellant King's Brief--p. 26) but was not successful. In short, this issue has been already litigated.

### The King Affidavit

It is respectfully contended that the King affidavit should be afforded very little, if any, weight in this proceeding because the facts, as already established by the files, records, and prior proceedings completely invalidate most of the King affidavit. Petitioner's memory is not only selective but is extremely suspect concerning the events of the evening of February 24, 1973. Petitioner's motive and bias in this proceeding are obvious.

Peitioner, for example, simply mentiones in paragraph six of his affidavit that

> "the events of that night brought me to the parking lot of the Ramada Inn."

Petitioner completely fails to mention his plea of guilty to the charge of possession of an unregistered hand-grenade and his admission of the facts and circumstances surrounding that plea of guilty -- namely, his smashing of a window and throwing a hand-grenade into the home of an FBI agent in Utica, New York. Petitioner thoughtfully fails to mention what magical propelling force "brought him" to the Ramada Inn, the very motel where the jury was being sequestered.

Petitioner asserts in paragraph eight of the King affidavit that a "shiny chrome revolver" was planted next to his body and that after being shot, a "dummy grenade" was also planted alongside his body. Viewing these allegations in light of the prior proceedings in this Court, shows these to be entirely baseless. Petitioner was indicted for possession of two unregistered hand-grenades and other charges, and has pleaded guilty to possession of one of these. His claim now that the second hand-grenade was not in his possession and was a "dummy grenade" should be summarily rejected by this Court. The allegations concerning the "dummy grenade" come, in affidavit form, some four years after this event and are totally contradicted by the files, records, transcripts, and prior proceedings in this Court.

## Petitioner's Contention That He Could Not Attend His Trial Is Meritless

The logic of petitioner's argument fails completely. The bridge he attempts to build between the use of physical force and his absence from the trial cannot withstand the weight of logic.

Let us assume for a moment that the King affidavit is accurate and that excessive deadly force was used at the Ramada Inn. (Circumstances the Government emphatically does not concede). Even under these facts, petitioner is not entitled to any relief, since the events at the Ramada Inn were not the sole cause of his hospitalization. The King affidavit claims that he was shot 3 times while at the Ramada Inn and had been shot 14 times earlier. His affidavit claims, in paragraphs 7 and 9, that he was already paralyzed by the earlier gun shot wounds. The only logical conclusion that can be drawn is that the 14 wounds inflicted during his earlier crime would have, of themselves, caused his extensive hospitalization regardless of any later injury at the Ramada Inn. Since petitioner's earlier injuries resulted from his own deliberate criminal act for which he is chargeable, his tenuous reasoning fails.

Petitioner carefully avoids reference to what was proved at the post-trial hearing. That hearing shows that petitioner was shot while committing a heinous felony; that is, while attempting an assault on an F.B.I. agent, or an arson of the agent's home, or while escaping from those felonies. Counsel's argument and answer to this is that law enforcement people were "lying in wait for petitioner at Agent Kelly's home". We submit that remark is entitled to the same weight as if petitioner were committing an armed bank robbery and a bank guard "lying in wait" shot him during the robbery.

Beyond all the tortured logic put forth by petitioner is the clear, inescapable fact that King missed very little of the actual trial. The claimed "loss of confrontation" is actually non-existent. The record clearly shows the only portion of the trial that petitioner missed was the playing of two tape recordings. Petitioner had, in fact already heard these same tapes during pre-trial discovery proceedings. The record is clear that petitioner did not miss any testimony against him from any government witness. Petitioner, in effect, missed no part of the Government's case but gained, and was afforded, the opportunity to testify in his own behalf from a hospital bed under circumstances sympathetic to him. In examining the record carefully, it is amazing to find that petitioner, in reality, missed no part of the government's case. The only occurrence during petitioner's absence from the trial was the playing of two tape recordings which petitioner had already heard. Petitioner was, of course, intimately familiar with these tapes since they concerned conversations in which he was a direct participant (trial transcript pp. 665-685).

Petitioner's claim of absence from his trial is totally without merit.

## RESPONSE TO PETITIONER'S POINT FOUR

Petitioner cites *Harris v. Nelson,* 394 U.S. 286 (1969) for the proposition that he should be given full latitude to pursue discovery, in depth, of a multitude of witnesses, most of whom have very little connection with the issues in this petition. Petitioner says *Harris* allows this discovery as a necessary adjunct to a habeas corpus application. The government respectfully disagrees.

Speaking for a divided court, Justice Fortas states, at the very outset of his opinion, the following:

> we conclude that, in appropriate circumstances, a district court, confronted by a petition for habeas corpus *which establishes a prima facie case for relief*, may use or authorize the use of suitable discovery procedures, including interrogatories . . . .

394 U.S. at 290 (Emphasis added)

*Harris* was a case where the District Court granted an evidentiary hearing and the issue was how the petitioner was to proceed to discover additional facts in support of his claim. In *Harris* the petitioner had obviously made a prima facie case for relief and the issue was implementation of his already sufficient petition. *Harris* dealt with the issue of the type of relief a District Court could fashion in an attempt to assist a petitioner with discoverying facts *for purposes of the hearing.*

> This is not to say that there is no way in which a district court may, in an appropriate case, arrange for procedures which will allow development, *for purposes of the hearing*, of the facts relevant to disposition of a habeas corpus petition. 394 U.S. at 298 (Emphasis added)

> At any time in the proceedings, when the court considers that it is necessary to do so in order that a fair and meaningful evidentiary *hearing may be held* . . . .
> 394 U.S. at 300 (emphasis added)

Whereas Harris dealt with a petitioner that had made a prima facie showing, that threshold has not been surmounted by petitioner King's papers.

> We do not assume that courts in the exercise of their discretion will pursue or authorize pursuit of all allegations presented to them. We are aware that confinement sometimes induces fantasy which has its basis in the paranoia of prison rather that in fact. *Harris* v. *Nelson,* 394 U.S. 286, 300; 89 S. Ct. 1082, 1091; 22 L.ed. 2d 291 (1969). *Accord*, *Barry* v. *U.S.* 528 F.2d 1094 (7th Cir. 1976); *Loper* v. *Beto*, 440 F.2d 934 6th Cir. 1971). Cf, *Cameron* v. *Fastoff*, 543 F.2d 1971 (2d Cir. 1976).

We do not overlook, of course, the discretion given to the district court concerning the nature and extent of permissible discovery.

The Government respectfully contends that the specific allegations before this Court are highly suspect, extremely weak and stale, and cannot reasonably be believed. The prepared questionnaire form type of statement is totally lacking in credibility since it's whole thrust revolves around two check marks. Based on this totally deficient "statement" of a juror, petitioner is entitled to no relief by this Court. Cf. *Willis* v. *Ciccone,* 506 F.2d 1011 (8th Cir., 1974).

It is interesting to note that petitioner requests depositions and a broad range of post trial inquisition, of the type that was expressly condemned in Harris, four years after verdict. Petitioner, for example, requests depositions of "[s]tation managers or other record custodians of local television and radio stations", (Motion p. 4), and every agent of the United States Government who supervised or communicated with the trial jurors subsequent to the "shoot out", and the Honorable Lloyd F. MacMahon, the trial judge.

Petitioner wishes the type of discovery appropriate to ordinary civil litigation and the Supreme Court in Harris decided that such discovery is not contemplated by the situation in a petition under 28 U.S.C. 2255. Argo v. United States, 473 F.2d 1315 (9th Cir. 1973), supports the government's contention that discovery procedures may be employed in the course of a Section 2255 hearing at the sound discretion of the trial judge.

Wagner v. United States, 418 F.2d (9th Cir. 1969) and the later Ninth Circuit case of Wallace v. United States, 457 F.2d 547 (1972) reject bald assertions that there was error in a trial but, require sufficient detail in the allegations. Although, the cases hold that "minute" detail is not required, they do require "sufficient" detail.

The government respectfully contends that the petition in the instant application is insufficient for the reasons stated heretofore, and that there should be no further discovery than was carried out by petitioner. If this Court should rule that further discovery is mandated then the Government contends that the guidelines set forth in Harris v. Nelson be observed and that strict control be exercised by the court over very selective discovery.

## RESPONSE TO PETITIONER'S POINT FIVE

Petitioner, in "Point Five", requests all memoranda in the Government's possession concerning:

a) "The shooting incident", and

b) Exposure of the jury to extra-judicial information concerning petitioner.

It is entirely unclear what petitioner means by "all memoranda", but, however interpreted, the Government respectfully opposes this request on the following grounds:

A) The request is entirely premature since the motion is inadequate on its face and no issues have been adequately raised. The request might only become important if this court found there was sufficient reason to re-litigate what has already been litigated.

B) The "shooting incident" (we assume petitioner refers to both incidents, i.e., the one at the home of the FBI agent and the one at the Ramada Inn) was the subject of an entirely separate investigation, a separate indictment, and a plea of guilty, by petitioner, to a count of that indictment. Discovery was obtained in the "hand grenade" case and now petitioner is attempting to get further criminal discovery through this proceeding. His guilty plea forecloses that attempt at further discovery.

C) Petitioner cites no authority for his request -- his demand for "all memoranda" would not be appropriate in any type of criminal proceeding and is inappropriate in this type of proceeding.

D) So far as is known to Assistant United States Attorney DiBianco, the Assistant responding to this petition, the Government has no information concerning exposure of the jury to extra-judicial information concerning petitioner.

140

## RESPONSE TO PETITIONER'S POINT SIX

Petitioner's request that his motion and all papers in these proceedings be sealed and that the Court prohibit dissemination to the press has already been ruled upon and we need go no further than Judge MacMahon's Memorandum opinion of January 13, 1977.

We pause to comment, however, that petitioner's request that the trial jurors ". . . remain free from pressures by either side . . ." is curious, and we believe it to be a tactical move to keep petitioner's "newly discovered information" undisturbed. As is apparent from the purported statement of Mrs. Helen Postal, a trial juror, petitioner has already contacted at least one juror and we query whether petitioner's questionnaire was not sent to all twelve trial jurors.

The Government agrees that the Court should maintain strict control over these proceedings to maintain their integrity.

## CONCLUSION

The Government respectfully submits that this motion should be denied without further hearing. The matter complained of is the product of King's own deliberate criminal conduct and to allow him to set aside his conviction as a result of his deliberate criminal conduct would be a perversion of justice. The motion itself is totally insufficient to require any further action since it contains no showing by competent nonhearsay evidence of anything new. The theories advanced and the grounds for these theories fail because they have already been litigated, have been waived or simply lack substance. The motion, therefore, is simply another attempt to relitigate what has already been litigated. It is respectfully submitted that the motion and the files and the records of this case conclusively show that the prisoner is entitled to no relief.

Respectfully submitted

Dated: March 21, 1977
Syracuse, N.Y.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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Criminal No. 73 Cr. 9

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LOUIS CHARLES KING,
Petitioner,

-vs.-

UNITED STATES OF AMERICA,
Respondent.

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# REPLY MEMORANDUM IN BEHALF OF PETITIONER LOUIS CHARLES KING

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## INDEX

Page

POINT I - If the jurors were, in fact, exposed to publicity concerning the shooting incident in which petitioner was involved, then petitioner was deprived of a fair trial and he is entitled to vacation of the sentence and judgment .......................... 1

POINT II - The unsworn statements of Mr. Wakeel properly provide a basis for an evidentiary hearing or, alternatively, for an order directing Mr. Wakeel to submit to a deposition .................. 4

POINT III - The trial juror who has given a statement, as well as the other trial jurors, may properly testify with respect to any extra-judicial information which was conveyed to them concerning the petitioner during the course of their sequestration .......................... 6

POINT IV - In the event that this Court should determine that the available evidence does not justify a hearing, then this Court should order that the relevant witnesses submit to depositions . 6

POINT V - The Court should direct the government to provide petitioner, in advance of the hearing, and in aid of the instant motion, all memoranda in its possession concerning the shooting incident, and concerning the exposure of the jury to extra-judicial information concerning petitioner .......................... 7

POINT VI - Pending an evidentiary hearing, this Court should protect the integrity of these proceedings by directing that the parties and court personnel not disseminate the contents of this petition or the contents of the government's response to the public or the press ...... 8

Page

POINT VII - The prior application for relief, pursuant to 28 U.S.C. § 2255, does not foreclose consideration of the instant petition ................ 9

POINT VIII - The issues raised by this petition have not been previously adjudicated on direct appeal ........... 10

POINT IX - Due to the excessive use of deadly force by the law enforcement officers who apprehended him, petitioner was unable to attend his trial and, therefore, was deprived of his Sixth Amendment right to confront and cross-examine the witnesses against him ................................. 10a

POINT X - Pursuant to 28 U.S.C. §§ 144 and 455, the Honorable Lloyd F. MacMahon is disqualified from further participation, as a judicial officer, in these proceedings, and this petition should be assigned to a different district judge .............................. 11

Conclusion ............................ 15

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

Criminal No. 73 Cr. 9

LOUIS CHARLES KING,

Petitioner,

-vs.-

UNITED STATES OF AMERICA,

Respondent.

# REPLY MEMORANDUM IN BEHALF OF PETITIONER LOUIS CHARLES KING

## POINT I

## IF THE JURORS WERE, IN FACT, EXPOSED TO PUBLICITY CONCERNING THE SHOOTING INCIDENT IN WHICH PETITIONER WAS INVOLVED, THEN PETITIONER WAS DEPRIVED OF A FAIR TRIAL AND HE IS ENTITLED TO VACATION OF THE SENTENCE AND JUDGMENT.*

Nowhere in the government's memorandum is it

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[*] This issue is discussed in the petition, at pp. 38-45 and purports to be discussed in the government's memorandum at pp. 10-16.

146

contended that if the jurors were aware of the shooting incident, such knowledge would not have been presumptively prejudicial to the petitioner. Likewise, the government does not deny that an evidentiary hearing is required where facts are shown which indicate that one or more of the trial jurors in a criminal case has been exposed to prejudicial publicity concerning the defendant during the course of the trial.

The government's response to Point I of the petition in fact ranges substantially beyond the above noted questions of law and is primarily devoted to arguments concerning whether the petition presents sufficient facts to call those legal principles into play for the purpose of securing a hearing and the other relief requested by the petition. Since we discuss the factual sufficiency of the petition elsewhere in the petition and in this reply memorandum, we shall here limit ourselves solely to that portion of the government's response to Point I which is relevant to that Point.

The government contends that prejudicial publicity, "was the direct foreseeable consequence of King's own deliberate conduct and not some outside force over which he had no control." (Gov. Mem., at p. 12). The trial court does not appear to have taken that view at the time of trial. A defendant is entitled to a fair and impartial jury. At the time of the shooting incident, the jury was sequestered and if proper preventive measures had been taken their exposure to prejudicial information via newspaper, television and telephone could have been foreclosed.

Additionally, if the defendant had not been subjected to a clearly planned ambush, the incident would not have taken on anywhere near the proportions involved. The nature of the planning which went into that ambush leaves little doubt that the law enforcement authorities could have arrested the defendant with little, if any, aggressive conduct occurring. They deliberately chose not to, and that was the immediate cause of the publicity.

The government also contends that petitioner should not be granted a hearing because: (a) a hearing would subject the jurors to the dangers of someone trying to "reach" them (Gov. Mem., at p. 16); (b) the jurors are "incompetent to testify" (Gov. Mem., Point III, at p. 27); (c) a hearing "would only serve to expose the jurors to further anxiety and, conceivably, additional threats." (Gov. Mem., Point III, at p. 28); (d) due to the passage of time, "the jurors' recollections will be hazy and susceptible to manipulation." (Id.); (e) due to the passage of time the jurors may confuse what they learned after the trial with what they knew during the trial (Gov. Mem., Point I, at p. 15; Point III, at pp. 26, 28).

None of the above contentions have any merit with respect to the question of whether the petitioner ought be accorded a hearing. We are not aware of any authority for the proposition that any of the above allegations constitute a basis for denial of a hearing.

The only way we will ever know the state of the recollection of the various jurors is if they are appropriately questioned. Petitioner cannot properly be taxed with present speculations as to the recollections of the jurors. Through counsel, he attempted to have the jurors discreetly questioned at the time of trial. That request was denied. Following the trial, the jurors were instructed not to talk to anyone concerning the case. Finally, in the absence of some gross mental harm having befallen a juror, it is unlikely in the extreme that a juror would forget whether he was aware of the shooting incident prior to the rendition of the jury's verdict.

The government's arguments are mere graspings at straws, borne of a desperate hope to prevent a judicial inquiry. The petition seeks to expose the truth, whatever it may be; the government's response seeks to bury it.

## POINT II

### THE UNSWORN STATEMENTS OF MR. WAKEEL PROPERLY PROVIDE A BASIS FOR AN EVIDENTIARY HEARING OR, ALTERNATIVELY, FOR AN ORDER DIRECTING MR. WAKEEL TO SUBMIT TO A DEPOSITION.*

Petitioner respectfully relies upon the arguments and authorities contained in Point II of the petition. The trial court's denial of the trial application to poll the jurors was predicated upon the hearsay assertions of an unidentified marshall. The information which has been provided by Mr. Wakeel substantially negates the reliability of whatever claims were made by the unidentified marshall. It would be a gross injustice if petitioner were prevented from placing these facts before the Court by virtue of the fact that Mr. Wakeel's employer has prohibited him from executing a sworn statement in the absence of a Court order.

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*This issue is discussed in the petition, at pp. 45-48, and in the government's memorandum at pp. 17-25.

## POINT III

### THE TRIAL JUROR WHO HAS GIVEN A STATEMENT, AS WELL AS THE OTHER TRIAL JURORS, MAY PROPERLY TESTIFY WITH RESPECT TO ANY EXTRA-JUDICIAL INFORMATION WHICH WAS CONVEYED TO THEM CONCERNING THE PETITIONER DURING THE COURSE OF THEIR SEQUESTRATION.*

As we have noted, Rule 606(b) of the Federal Rules of Evidence provides that a juror may testify on the question of whether extraneous prejudicial information was properly brought to the jury's attention and as to whether any outside influence was improperly brought to bear on any juror. The government's purported response does not refute that evidentiary rule, nor does the government cite any authority to the contrary. The government's response to our Point III is a somewhat confused effort to attack the sufficiency of the factual allegations of the petition. To the extent that the government's response challenges the competency of the jurors to testify as to those facts, the government is clearly in error.

## POINT IV

### IN THE EVENT THAT THIS COURT SHOULD DETERMINE THAT THE AVAILABLE EVIDENCE DOES NOT JUSTIFY A HEARING, THEN THIS COURT SHOULD ORDER THAT THE RELEVANT WITNESSES SUBMIT TO DEPOSITIONS.**

To the extent that the government, elsewhere in its response, contends that the information thus far provided by Mrs. Postal is vague, ambiguous, and otherwise insufficient, petitioner hereby requests permission to interview all of the jurors. It is petitioner's understanding that he is not presently permitted to do so. It is incredible that the government seems to require of petitioner a detailed statement of what the jurors actually heard and saw, when the government is well aware that petitioner cannot personally, or through counsel, interview the jurors.

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*This issue is discussed in the petition, at pp. 48-51, and purports to be discussed in the government's memorandum at pp. 26-28 .

**This issue is discussed in the petition, at pp. 51-2, and in the government's memorandum, at pp. 36-38.

With respect to the specific requests set forth under Point IV of the petition, petitioner stands upon the arguments which have already been placed before the Court, and notes that the government concedes that such discovery procedures may be ordered as a matter of "sound discretion" (Gov. Mem., at p. 38).

## POINT V

### THE COURT SHOULD DIRECT THE GOVERNMENT TO PROVIDE PETITIONER, IN ADVANCE OF THE HEARING, AND IN AID OF THE INSTANT MOTION, ALL MEMORANDA IN ITS POSSESSION CONCERNING THE SHOOTING INCIDENT, AND CONCERNING THE EXPOSURE OF THE JURY TO EXTRA-JUDICIAL INFORMATION CONCERNING PETITIONER.*

We note that the government's unsworn response makes no representation that the government has made any

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*This issue is discussed in the petition, at pp. 52-53, and in the government's memorandum at p. 39.

152

effort to ascertain whether the government possesses any information relating to the exposure of the jury to extrajudicial information concerning the petitioner. To that extent, the representation of the particular assistant United States attorney who prepared the response, and who has not heretofore been involved in this case, is without any worth.

The government appears to contend that the petitioner's request for discovery is premature and must await the grant of a hearing. At the same time, the government contends that the allegations of the petition are legally insufficient to require a hearing. We respectfully submit that if the government has in its possession any factual information which would support the contentions of the petition, either as to jury prejudice or as to the unwarranted extent of injuries inflicted upon the petitioner, then it is the government's due process obligation to make those facts known both to the Court and to the petitioner.

## POINT VI

### PENDING AN EVIDENTIARY HEARING, THIS COURT SHOULD PROTECT THE INTEGRITY OF THESE PROCEEDINGS BY DIRECTING THAT THE PARTIES AND COURT PERSONNEL NOT DISSEMINATE THE CONTENTS OF THIS PETITION OR THE CONTENTS OF THE GOVERNMENT'S RESPONSE TO THE PUBLIC OR THE PRESS.*

This Court has ordered that the papers in this proceeding be sealed, and we respectfully request that that order be continued.

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*This issue is discussed in the petition, at pp. 53-54, and in the government's memorandum at p. 40.

The government agrees that the Court should maintain strict control over these proceedings in order to maintain their integrity. We request that such control be continued.

## POINT VII

## THE PRIOR APPLICATION FOR RELIEF, PURSUANT TO 28 U.S.C. § 2255, DOES NOT FORECLOSE CONSIDERATION OF THE INSTANT PETITION.*

The government argues that the prior § 2255 application forecloses consideration of the instant application. The argument will not withstand analysis. It is clear, beyond any doubt, that petitioner was not properly a party to the prior application. When he discovered he had been made a party, he took every effort to withdraw from that proceeding. At the time of that proceeding, petitioner did not have available to him the statement of one of the jurors. Similarly, at that time, Mr. Wakeel refused to swear to the facts surrounding the sequestration of the jury at the Motel. In short, the present application is not just a re-statement of the prior application, but is far more substantial.

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*This issue is discussed in the petition at p. 54, and in the government's memorandum at pp. 29-30.

154

The government submits that petitioner purposely did not join in the prior application pursuant to a plan to circumvent the successive motion prohibition. In support of that contention, the government refers this Court to petitioner's letter to his attorney, which is reproduced in the petitioner's appendix, Volume II, at p. A-290. We respectfully request that this Court examine that letter, of July 17, 1975, in its entirety, and not merely in the edited version provided by the government. The petitioner, in that letter, clearly distinguishes between what he calls an "affirmation hearing" and "a 2255 motion". He also makes reference to his letter of June 5, 1975, as outlining his plan for the § 2255 proceeding. The letter of June 5, 1975, is reproduced at A-281. Taken as a whole, all of the correspondence between petitioner and his attorney does not shown an effort by petitioner to circumvent the successive petition rule.

## POINT VIII

## THE ISSUES RAISED BY THIS PETITION HAVE NOT BEEN PREVIOUSLY ADJUDICATED ON DIRECT APPEAL.

Petitioner stands upon his contention that the issues presented by this petition have not been previously adjudicated on direct appeal. The government unsuccessfully

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*This issue is discussed at p. 55 of the petition and at pp. 31-32 of the government's memorandum.

attempts to portray the distinction between the petition and the appellate brief as being one of semantics rather than one of substance. The brief speaks for itself, and we are confident that the Court will readily appreciate the difference.

## POINT IX

## DUE TO THE EXCESSIVE USE OF DEADLY FORCE BY THE LAW ENFORCEMENT OFFICERS WHO APPREHENDED HIM, PETITIONER WAS UNABLE TO ATTEND HIS TRIAL AND, THEREFORE, WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO CONFRONT AND CROSS-EXAMINE THE WITNESSES AGAINST HIM.*

The right to confront and cross-examine is the right to attend at one's trial - in full. The defendant was not only absent from that portion of the trial which involved the playing of certain tape recordings, he was also absent from the trial with respect to a portion of the testimony of FBI Agent Robert J. Kolevar (Tr. 686-689), through which the tape recordings were received in evidence. Similarly, he was absent from the entire remainder of the trial, including the defense case, defense motions, summations to the jury, and submission of the case to the jury.

The government argues that petitioner cannot complain since his inability to attend the trial was the product of his own wrongdoing. The burden of our argument is that the injuries visited upon petitioner were absolutely unnecessary and, therefore, constituted a supervening intervening cause for his absence. The government attempts to meet that argument by apparently conferring upon law enforcement authorities some kind of a right to summarily execute individuals whom they know are about to commit crimes. They cite no authority for that proposition. Such a view should be summarily rejected by this Court.

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*This issue is discussed at pp. 55-58 of the petition and at pp. 33-35 of the government's memorandum.

### POINT X

### PURSUANT TO 28 U.S.C. §§ 144 & 455, THE HONORABLE LLOYD F. MACMAHON IS DISQUALIFIED FROM FURTHER PARTICIPATION, AS A JUDICIAL OFFICER, IN THESE PROCEEDINGS, AND THIS PETITION SHOULD BE ASSIGNED TO A DIFFERENT DISTRICT JUDGE.*

The government's response is inadequate both in its view of the facts and of the applicable law.

It will be noted that the government thoroughly ignores 28 U.S.C. § 455, which is quoted at pp. 62-63 of the petition. That statute, which was enacted on December 5, 1974, substantially liberalized the disqualification procedure in favor of the moving party. Samuel v. University of Pittsburgh, 395 F. Supp. 1275 (D.C.Pa., 1975). Under that statute, disqualification is mandatory if, inter alia, the judge has personal knowledge of disputed evidentiary facts concerning the proceedings, or if the judge is likely to be a material witness in the proceedings. Subsection (d) (1) states that "'proceeding' includes pre-trial, trial, appellate review, or other stages of litigation;".

Judge MacMahon, concededly, has personal knowledge of disputed evidentiary facts concerning the instant proceeding. Those facts were secured by the Judge, ex parte. Ironically, the government's memorandum, in attempting to overcome the direct and circumstantial evidence of juror exposure to prejudicial publicity, relies heavily upon those ex parte observations (e.g., Gov. Mem., at pp. 19, 20, 21, 22).

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*This issue is discussed at pp. 58-63 of the petition, and at pp. 6-9 of the government's memorandum in opposition.

The government's memorandum cites only two opinions written after the enactment of § 455. United States v. Schwartz, 535 F. 2d 160, 165 (2d Cir., 1976) contributes nothing to an understanding of the law applicable to the present case. It merely mentions, in passing, that "Adverse rulings, standing alone, do not establish judicial bias or prejudice,***nor create a reasonable question of judicial impartiality.***" [Only citations omitted](535 F. 2d 160, 165). United States v. Bernstein, 533 F. 2d 775 (2d Cir., 1976), involved a recusal application which pre-dated the enactment of § 455, and the opinion explicitly was not decided under the standards imposed by § 455 (533 F. 2d at 785).

Although § 455 is controlling in this case, even the cases decided prior to its enactment support petitioner's recusal application. Thus, in United States v. Bernstein, supra, the Court stated that "the rule of law...is that what a judge learns in his judicial capacity ...is a proper basis for judicial observations, and the use of such information is not the kind of matter that results in disqualification." (533 F. 2d at 785). A judge acquires information "in his judicial capacity" either from the files and records of the case or by way of proceedings of record. In the present case, Judge MacMahon's conversation with an unidentified marshall, as well as any other information acquired by Judge MacMahon, _ex parte_, does not fall within either of the aforementioned categories. The fact that Judge MacMahon later repeated, for the record, a summary of his extra-judicially-acquired information, does not change its extra-judicial nature.

Of the authorities cited by the government, the only one which warrants further discussion is _Panico_ v. _United States_, 412 F. 2d 1151 (2d Cir., 1969). In _Panico_, two defendants moved to have their convictions set aside, pursuant to 28 U.S.C. § 2255, upon the ground that the outregeous behavior of a third defendant, at trial, had deprived them of a fair trial. They moved to disqualify the trial judge upon the ground that the judge had been a witness to the behavior of the third defendant and would, therefore, be a witness to the fact sought to be established by the § 2255 application.

In affirming the refusal of the trial judge to disqualify himself, _Panico_ held that "... § 455 does not in any way affect the trial court's sitting with respect to preliminary orders." (412 F. 2d at 1156).

At the outset, it must be noted that _Panico_ was decided under a pre-1974 version of § 455. We respectfully urge that the present version would require a contrary result. Moreover, this case is thoroughly distinguishable from _Panico_. There, the observations of the trial judge were made at the trial, itself, and not under _ex parte_ or extra-judicial circumstances. Moreover, for the most part, the government's response to the petition in the present case does not relate to the "legal sufficiency" of the petition (412 F. 2d at 1156), but rather to the factual sufficiency of the petition, i.e., whether or not a sufficient demonstration is made that one or more of the trial jurors was exposed to prejudicial publicity. It is _that_ fact as to which the trial judge has allegedly secured extra-judicial information. In short, a determination of the factual sufficiency of the petition is so thoroughly intertwined with the Court's _ex parte_, off the record investigation, that it would be improper for the Court to pass upon the merits of the application.

Thus, while petitioner contends that the other allegations of bias and prejudice contained in the petition (revelation to the trial judge of petitioner's obviously privileged communication to his attorney, expressed attitude of the trial judge toward petitioner, etc.), independently provide a basis for recusal (whether mandatory or discretionary), the totality of the circumstances certainly require the trial judge's disqualification.

## Conclusion

WHEREFORE, for the reasons stated in the petition and in this reply memorandum, the petitioner, who is presently incarcerated at the Lewisburg Federal Penitentiary, in Lewisburg, Pennsylvania, respectfully requests that:

the Honorable Lloyd F. MacMahon be disqualified from participating, in a judicial capacity, in any further proceedings in this case, and that the Court vacate petitioner's sentence pursuant to 28 U.S.C. § 2255, and grant him a new trial.

Respectfully submitted,

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New York, New York
April 1, 1977

copy

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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LOUIS CHARLES KING, :

Petitioner, : 73-CR-9

-against- : **OPINION**

UNITED STATES OF AMERICA, :

Respondent. :

---------------------------------x

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MacMAHON, District Judge.*

Petitioner, Louis Charles King, and three co-defendants were convicted, following a jury verdict on

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* Of the United States District Court for the Southern District of New York, sitting by designation.

163

March 1, 1973, of making extortionate extensions of credit and using extortionate means to collect extensions of credit, in violation of 18 U.S.C. §§ 892 and 894. Their convictions were affirmed without opinion, United States v. King, 486 F.2d 1397 (2d Cir. 1973), and certiorari was denied, 466 U.S. 958 (1974).

## FACTS

The files and records of this case conclusively show the following facts and demonstrate that the actual facts are materially different from the hearsay, conclusory, speculative, spurious and distorted version set forth in the petition.

As a result of an extensive investigation into loan sharking, conducted by the Utica office of the Federal Bureau of Investigation ("FBI") under the direction of Special Agent Louis Kelly, Senior Resident Agent, petitioner King and three co-defendants were indicted on charges of making extortionate extensions of credit and using extortionate means to collect extensions of credit, in violation of 18 U.S.C. §§ 892 and 894.

Trial of the action began at Utica on February 20, 1973, and all defendants remained free on bail. At the outset, the government moved to sequester the jury, based upon a showing that sequestration was necessary to insulate the jury from anticipated prejudicial publicity and because petitioner King had made threats on the life of an FBI agent; there were plots to kill the principal witness (the victim of the loan sharking) and one of the defense attorneys, to bribe a judge and jurors, and to engage in other criminal acts, including subornation of perjury and obstruction of the trial.

The trial proceeded for three days without any extraordinary incident, but during the weekend recess, late on Saturday night, February 24, 1973, an automobile stopped in front of Agent Kelly's home; King got out, walked across the front lawn, smashed the front window and deliberately threw a hand grenade into Kelly's living room. There was a flash, and King ran toward the automobile. Agents or police officers, on the scene guarding Kelly's home, exchanged shots. King was wounded but managed to get back into the automobile and escape. Followed, he was found some minutes later in the parking lot of the Ramada Inn, several miles away, where the jury had been sequestered since the beginning of the trial. Again, shots were exchanged; King was seriously injured and was taken to nearby St. Luke's Hospital. Another explosive device was found on his person before he was taken to the hospital.

The jury ultimately convicted King and his co-defendants on the loan sharking charges. King now petitions for habeas corpus relief under 28 U.S.C. § 2255, seeking to vacate his judgment of conviction and sentence and requesting various other forms of relief. He grounds his petition on allegations that (a) the jury was actually or possibly exposed to prejudicial publicity concerning the bombing and shooting incidents, and (b) the government agents used excessive force which deprived him of his constitutional right to be present at the trial. We deny the petition.

When court reconvened on Monday morning, defense counsel and the Assistant United States Attorney reiterated the substance of the events of Saturday night. All defendants moved for a mistrial, and King's attorney also moved for severance, stating that the physician treating King had indicated it would be at least two months before King could appear in court. We denied the motions, made a tentative finding, on the basis of the attorneys' statements and subject to a subsequent evidentiary hearing, that King had voluntarily absented himself from the proceedings, and continued the trial in his absence. We also denied counsel's motion to voir dire the jury to determine whether they had learned of the events of Saturday.

The marshal in charge of the jury had been instructed from the outset of the trial to insulate the jury from all media publicity about the case and had assured us that our instructions in that regard had been followed. The marshal also assured us that the jury, sequestered on the opposite side of the motel from the parking lot where the shooting occurred, had not become personally aware of the fracas and had not seen or heard

167

any publicity concerning it. The news media were, of course, aroused by the grenade-throwing and shooting incidents, and those events were widely publicized.

Counsel continued vigorously to represent King through the remaining phases of the trial. He stated that King wished to testify at the hospital in his own behalf. At counsel's request and in the presence of all counsel, we carefully interrogated King's attending physician, Dr. Millett, and visited King at his bedside to satisfy ourselves that he was able to testify and that there was nothing about King's appearance to shock or prejudice the jury. Satisfied that he could testify, we convened a special session of the court and jury in the hospital, where King testified from his bed. The jury was not told the reason for King's hospitalization; indeed, we specifically cautioned the jurors that they should not speculate as to the cause of his injuries.

The trial continued and was concluded, the jury deliberated for some thirteen hours and returned a verdict of guilty against all defendants on all

168

counts. We denied counsel's motion for a new trial. Thereafter, we conducted an evidentiary hearing, at which an agent present at the grenade-throwing incident testified to the events already recounted. King and his co-defendants declined to present any evidence but rested on the government's proof. We again concluded that King had, through his own voluntary acts, started the foreseeable chain of events resulting in his hospitalization and consequent absence from the trial. Illinois v. Allen, 391 U.S. 97 (1970); Diaz v. United States, 223 U.S. 442, 445 (1912); United States v. Tortora, 464 F.2d 1202 (2d Cir. 1972).

We note that the incidents in question were not the first indications that efforts would be made to sabotage the trial. Although we were not originally inclined to undertake the extraordinary measure of sequestration, we concluded that sequestering the jury was appropriate for the reasons stated above and because King's attorney represented that he feared that Marrone, a severed co-defendant who would later testify at King's trial, would bring and use a gun in the courtroom.

Finally, we note that King later pled guilty to possession of the hand grenade, and throwing it through Kelly's window.

## MOTION TO DISQUALIFY

We consider first King's motion to disqualify the court from consideration of this petition. King relies on 28 U.S.C. § 144, providing for disqualification where the court is personally biased or prejudiced against a party, and on 28 U.S.C. § 455, providing for disqualification where a judge may be a material witness in the proceeding. We find no cause under either section to warrant disqualification here.

Section 144 provides for disqualification of a judge whenever a party "makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party . . ." (emphasis added). While a judge ruling on a motion to disqualify must take as true the allegations of the affidavit, the mere filing of the affidavit does not automatically disqualify a judge, and the judge has the duty to pass upon the sufficiency of the affidavit. Berger v. United States, 255 U.S. 22 (1921). Such an affidavit will be deemed sufficient only if it gives "fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." Id. at 33-34. The affidavit filed in this proceeding is plainly insufficient to support such a charge.

Ordinarily, an affidavit under § 144 must demonstrate a personal bias or prejudice stemming from an extra-judicial source. United States v. Grinnell Corp., 384 U.S. 563, 583 (1966). Opinions formed during the course of judicial proceedings, on the basis of evidence presented and conduct observed by the judge, are not the "personal" bias or prejudice required to disqualify. United States v. Sclafani, 487 F.2d 245, 255 (2d Cir. 1973); Mirra v. United States, 379 F.2d 782, 787-88 (2d Cir. 1967). King cites no extra-judicial, personal bias or prejudice against him.

King suggests that rulings adverse to him during the course of the trial present a "likelihood" that the court will not be able to assess objectively the allegations of the present petition. It is clear, however, that rulings adverse to a party are insufficient to establish judicial bias or prejudice. Ex parte American Steel Barrel Co., 230 U.S. 35, 43-44 (1913); United States v. Schwartz, 535 F.2d 160 (2d Cir. 1976).

King also suggests that the twenty-year sentence imposed by the court and the court's comments at the time of sentencing establish the bias or prejudice necessary to disqualify. We note, however, that King was convicted of seven counts, each carrying a twenty-year maximum sentence, and that the court's imposition of concurrent twenty-year terms for each count was well under the maximum allowed by law. In Calvaresi v. United States, 216 F.2d 891, 900 (10th Cir. 1954), the court said:

> "While the sentences imposed are very severe, they are in every instance within the legal maximum provided by statute. It cannot be said that standing alone the imposition of a sentence which the court had lawful authority to impose shows bias and prejudice."

172

Nor do the court's comments at sentencing establish a personal bias against King, as they were based entirely on the evidence presented to the court in its judicial capacity. As the court most clearly pointed out in United States v. Bernstein, 533 F.2d 775, 785 (2d Cir. 1976):

> "The rule of law, without belaboring the point, is that what a judge learns in his judicial capacity--whether by way of guilty pleas of codefendants or alleged coconspirators, or by way of pretrial proceedings or both--is the proper basis for judicial observations, and the use of such information is not the kind of matter that results in disqualification."

That principle would apply *a fortiori* to information obtained during the course of the trial itself, all of which justified our comments and the sentence imposed on King.

We note, additionally, that even though personal bias or prejudice normally must derive from

173

extra-judicial sources, contacts during a trial may create such a degree of irritation as to create the objectionable bent of mind referred to in *Berger*. See *Wolfson* v. *Palmieri*, 396 F.2d 121, 124-25 (2d Cir. 1968); *Rosen* v. *Sugarman*, 357 F.2d 794 (2d Cir. 1968). King's trial, however, is totally devoid of the kind of acrimony involved in *Rosen* and *Wolfson*, *supra*, where the Court of Appeals upheld the judges' refusal to disqualify themselves.

Finally, we see no merit in King's claim that the court should be disqualified under § 455 on the ground that the court will be a material witness in any hearing convened to determine the facts on which King's claim is based. First, we conclude that no hearing is required in order to evaluate King's legal claims, and, secondly, King's petition on its face reveals that the court has no personal knowledge of any factual matters in dispute and cannot, therefore, serve as a material witness.

Accordingly, we deny King's motion, under both 28 U.S.C. §§ 144 and 455, to disqualify the court from consideration of his petition. As Mr. Justice Rehnquist noted in Laird v. Tatum, 409 U.S. 824, 837 (1972):

> "Those federal courts of appeals that have considered the matter have unanimously concluded that a federal judge has a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified."

## ACTUAL OR POSSIBLE EXPOSURE OF THE JURY TO PREJUDICIAL PUBLICITY

Turning now to the merits of King's petition, we note at the outset that issues arising out of this bizarre series of events have been fully litigated on at least two other occasions. First, King appealed his conviction to the Second Circuit, and the issues of possible prejudice to the jury from exposure to press coverage of the Saturday shoot-out and our refusal to conduct a voir dire were fully raised, briefed, argued and rejected by the Court of Appeals, which affirmed the convictions without opinion, 486 F.2d 1397, and the issues were then raised in King's petition for certiorari, which the Supreme Court denied, 416 U.S. 958.

Second, on April 17, 1975, King's trial counsel, Mr. Brindisi, filed a petition under 28 U.S.C. § 2255, joined by his other co-defendants, Zogby, Mazza and Talerico, in which the same issues were again raised, fully litigated and denied. It appears, however, that although King's counsel never moved formally to withdraw the motion as to King, he did write to the clerk of the court to withdraw King's petition. We did not regard that as a proper procedure and rendered our decision on September 5, 1975 denying the petition. No motion for modification of that memorandum order was made on behalf of King, nor was any appeal taken. While we feel that petitioner has had ample opportunity to litigate his contentions, we have, nevertheless, again reviewed the record in the case and the voluminous papers submitted on the instant petition, and again conclude that King is not entitled to relief.

Notwithstanding the prior litigation of "possible" jury exposure to publicity, King claims that there is now sufficient new evidence of such exposure to warrant complete collateral review. He requests that we hold a hearing on the issue or permit counsel to take the depositions of the jurors. This new evidence, however, is plainly insufficient to warrant such extraordinary measures.

First, King submits a questionnaire-type form document, purportedly executed by Mrs. Helen Postal, one of the petit jurors at King's trial. Mrs. Postal has check-marked a number of blanks provided on the form, allegedly indicating that she had read newspaper accounts of the trial, saw television news briefs concerning the case, and that, when the trial was convened at the hospital, she was "aware why the defendant was in the hospital at that time." The form is unsworn, contains no personal statement of facts, and the name of the county in which Mrs. Postal supposedly lives is misspelled, casting further doubt on its trustworthiness. Furthermore, even if we take the "statements" as true, they are patently ambiguous as to Mrs. Postal's actual exposure to prejudicial information about the case. Nowhere does the statement refer to her actual awareness, or exposure to publicity concerning the weekend incidents perpetrated by King.

Second, there is a hearsay statement by a supposed "witness" to Mrs. Postal's execution of the form, indicating the same facts contained on the questionnaire check-marked by Mrs. Postal.

Finally, King's counsel relates the substance of his conversations with Ronald Wakeel, assistant manager of the Ramada Inn, to the effect that it was possible for the jury to have seen media accounts of the bombing and shooting incidents, or to have heard about them on the telephone. These hearsay statements reveal no personal knowledge that the jury was exposed to publicity or other sources of information, and we note additionally that Wakeel refused to sign the affidavit prepared by counsel on the basis of those conversations.

Nearly identical arguments were raised and rejected in People v. Manson, 61 Cal.App.3d 102, 132 Cal. Rptr. 265 (2d Civ. 1976), cert. denied sub nom. California v. Manson, 45 U.S.L.W. 3707 (U.S. Apr. 26, 1977). The Manson case, involving the so-called "Helter Skelter" murders by Charles Manson and his "family," attracted massive local and international publicity, requiring the sequestration of the jury. Among numerous other points on appeal, the Manson defendants claimed the trial judge erred in refusing counsel's numerous requests, both during and after the trial, to voir dire the jury concerning their exposure to publicity about the case and various other related events. The Court of Appeals upheld the judge's refusal to voir dire the jury during the trial, noting:

> "The trial court properly denied applications of appellants' counsel to voir dire the jury to determine if it had been exposed to this publicity. The application was not supported by any showing that the court's security or jury maintenance order had been violated.
>
> * * *
>
> The trial court informed counsel that it was monitoring the sequestration and was satisfied that the jurors were not subjected to news about the case. Under the circumstances the court's decision was correct. The whole purpose of the elaborate sequestration would have been frustrated if the court had been required to voir dire the jury to ask if they had knowledge of the very information that was to be kept from them. In the absence of hard evidence that jurors were subjected to news stories or any other information that might have been prejudicial, there was no sense in allowing a court to be drawn into a 'Catch 22'." 132 Cal.Rptr. at 318-19 (emphasis added) (footnote omitted).

The Manson court similary rejected counsel's post-trial motion for a new trial, based on counsel's declaration that one of the jurors had told him personally that he was familiar with news coverage of the trial, along with various other accounts pertaining to jury misconduct. The court again upheld the judge's refusal to voir dire the jury, holding that such hearsay and double hearsay accounts were "insufficient to impeach the verdict or to compel the court to conduct a post-verdict voir dire of the jury." 132 Cal.Rptr. at 336. Furthermore, the court held that in view of the insufficient showing, there was no need to call jurors to the witness stand to testify about those purported occurrences.

As in Manson, we were satisfied during King's trial, on the marshal's assurances, that our sequestration order had not been violated. There was not then, nor is there now, any "hard evidence" that the jury was in fact aware of King's extra-curricular activities. At most, the ambiguous hearsay statements now offered merely reiterate the possibility of jury exposure to allegedly prejudicial matters, a possibility present in any criminal trial. We do not find King's offerings here to bring his charges of jury prejudice above the level of likelihood fully presented, to no avail, to the Court of Appeals and the Supreme Court, on direct appeal.

Furthermore, an examination of the length and care of the jury's deliberations and the overwhelming evidence against King, reinforces our conclusion that the jury was not prejudiced against him. The jury deliberated for more than thirteen hours, spread over a two-day period, and made numerous requests for items of evidence, including transcripts of tape recordings introduced at trial. Those recordings were made by witness Sackman, the loan sharking victim, of conversations he had participated in with King, in which King threatened violence if Sackman did not repay the loans extended to him. The length of the jury's deliberations, coupled with its repeated requests for evidence (much of which concerned only defendant King's role in the crimes), attests to the careful scrutiny the jury gave the convincing evidence against King. We can only conclude that the jury based its verdict on careful consideration of the evidence, and in view of the strong policy against impeachment of a jury verdict, see United States v. Crosby, 294 F.2d 928, 949 (2d Cir. 1961), we find petitioner's evidence insufficient to mandate a post-verdict voir dire.

Finally, and most importantly, public policy and sound judicial administration require that the relief sought be denied even if King could demonstrate that the jury had been exposed to publicity concerning the attempted bombing and resultant shooting of him. We are well aware of those cases holding that defendants are entitled to trials free of prejudicial effect from adverse publicity and that any extra-judicial acquisition of knowledge about the case by jurors will be deemed prejudicial unless the government can establish that it was not. See, e.g., Sheppard v. Maxwell, 384 U.S. 333 (1964); Estes v. Texas, 381 U.S. 532 (1964); Rideau v. Louisiana, 373 U.S. 723 (1963); Marshall v. United States, 360 U.S. 310 (1959); Remmer v. United States, 347 U.S. 227 (1953).

In our view, however, there is an important difference in this case, where King complains of the prejudicial effect of news coverage indisputably generated by his own voluntary acts of criminal misconduct during the course of his trial. Counsel have not cited, nor have we found, any reported case dealing with this precise situation. Nevertheless, we feel that this case falls well within the ambit of those cases holding, in the broadest language, that defendants may, through their own actions, waive the due process rights guaranteed by the Constitution, and that they may not, through their own actions, provoke and benefit from a mistrial.

For example, in Illinois v. Allen, 397 U.S. 337 (1970), the Court sustained the conviction of a defendant who was removed from the courtroom because of his disruptive behavior, commenting:

> "It is not pleasant to hold that the respondent Allen was properly banished from the court for a part of his own trial. But our courts, palladiums of liberty as they are, cannot be treated disrespectfully with impunity. Nor can the accused be permitted by his disruptive conduct indefinitely to avoid being tried on the charges brought against him." 397 U.S. at 346 (emphasis added).

See also the concurring opinion of Mr. Justice Brennan, who wrote:

183

> "[T]here can be no doubt whatever that the governmental prerogative to proceed with a trial may not be defeated by conduct of the accused that prevents the trial from going forward.
>
> * * *
>
> To allow the disruptive activities of a defendant like respondent to prevent his trial is to allow him to profit from his own wrong. The Constitution would protect none of us if it prevented the courts from acting to preserve the very processes that the Constitution itself prescribes." 397 U.S. at 349-50.

Our Court of Appeals embraced a similar notion in United States v. Bentvena, 319 F.2d 916, 931 (2d Cir.), cert. denied, 375 U.S. 940 (1963), when it said:

> "Law enforcement and fair trial for those accused of violations is not to be limited to the pattern chosen by defendants. The administration of criminal justice in the federal courts will not be delivered into the hands of those who could gain only from its subversion."

See also Diaz v. United States, 223 U.S. 442, 445 (1912); United States v. Yanagita, No. 76-1405 (2d Cir., Mar. 30, 1977); *United States* v. *Tortora*, *supra*, 464 F.2d 1202; *United States* v. *Aviles*, 274 F.2d 179 (2d Cir. 1959), *cert. denied*, 362 U.S. 974 (1960).

Those cases, allowing a continuance of a trial in spite of a defendant's disruptive courtroom behavior or voluntary absence, convey a clear deterrent message: once a trial has begun, the court is authorized, indeed obligated, to bring that trial to a just and speedy conclusion, and the defendant will not be empowered to stop the proceedings according to his own design. A similar rule must apply here, lest we license defendants to devise even more bizarre, ingenious and outrageous methods to bring the trial to a halt or, later, to set aside the jury's carefully-considered verdict.

Reduced to essentials, King's claim here is that a defendant on trial, privileged to remain free on bail, may engage in the most bizarre, outrageous, criminal acts, which, of course, are most likely to be newsworthy and prejudicial and may then require the court to determine that no juror was subjected to news coverage or other reports of the acts. If the court cannot so determine, the trial must be aborted and begun anew. This, in our view, would amount to a wholesale transfer of the fate of criminal trials into the hands of the most ruthless defendants, while any other defendant, content simply to appear when required and to maintain good behavior, must have his trial proceed through to conclusion.

The Court, in Illinois v. Allen, supra, was concerned only with scurrilous, abusive language by the defendant, which in the Court's view was inconsistent with "the decorum and respect inherent in the concept of courts and judicial proceedings." 397 U.S. at 343. As the Court went on to say:

> "It would degrade our country and our judicial system to permit our courts to be bullied, insulted, and humiliated and their orderly progress thwarted and obstructed by defendants brought before them charged with crimes." 397 U.S. at 346.

In another context, commenting on a defendant's voluntary absence from his trial, the Court of Appeals for the District of Columbia said:

> "The question is one of broad public policy, whether an accused person, placed upon trial for crime and protected by all the safeguards with which the humanity of our present criminal law sedulously surround him, can with immunity defy the processes of that law, paralyze the proceedings of courts and juries, and turn them into a solemn farce, and ultimately compel society, for its own safety, to restrict the operation of the principle of personal liberty. Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong."

Falk v. United States, 15 App.D.C. 446, 460 (1899), quoted with approval in Diaz v. United States, supra, 223 U.S. at 458, and in Illinois v. Allen, supra, 397 U.S. at 349-50 (Brennan, J., concurring).

It cannot seriously be argued that a defendant may not avoid the consequences of a trial merely by hurling epithets at the judge, or by absconding, yet may do so indirectly, by engaging in criminal acts against a law enforcement officer outside the courtroom. In this case, King's actions at the very least were calculated to obstruct the orderly progress of justice, posed a serious threat to the very life of law enforcement officers (not to mention the public at large, since firearms and explosives were involved), and were certain to be publicized and possibly brought to the jury's attention. Indeed, but for the fact that the jurors were sequestered, it would have been a virtual certainty that they would have learned of King's activities.

It is worth emphasizing that King complains not of news coverage of his trial over which he had no control, but about news coverage of his own voluntary criminal act which, except for possible revenge, was completely unrelated to the charges for which he was on trial. On the peculiar facts involved in this case, we conclude that King cannot be heard to complain even if some publicity, or telephone reports from concerned friends and relatives, may have reached the jury. Indeed, it is but fortunate that King's own injuries and the resultant news coverage were the only consequences of King's efforts. The grenade did not explode in the agent's home, and we can only speculate as to King's intentions, or the potential consequences when he later appeared at the motel where the jury was staying, explosives and firearms in hand.

Accordingly, we find that petitioner has failed to make a sufficient showing that any prejudicial information reached the jury and that, even if it did, any such prejudice was instigated, created and caused by King's own wrongful acts, and he should not be entitled to relief from his conviction. Because the motion and files and records of this case conclusively show that petitioner is entitled to no relief, we deny petitioner's request for a hearing or to take the depositions of the members of the jury.

## EXCESSIVE USE OF FORCE BY LAW ENFORCEMENT OFFICERS

Petitioner's second ground for relief need not detain us long. King claims that the FBI agents and state police who finally subdued him used excessive force, thereby unconstitutionally preventing him from attending his own trial. As noted above, it was clearly petitioner's own wilful acts that placed him in the foreseeable position of being injured by police officers attempting to prevent further violence, or to prevent his escape after committing, at the very least,

189

an attempted assault or arson. The use of such deadly force by the officers is clearly mandated by New York Penal Law § 35.30. We found, in an opinion dictated into the record at the conclusion of the post-trial hearing, and adhere to that conclusion, that King had, through his own voluntary acts, waived his right to be present at the trial. Diaz v. United States, supra, 223 U.S. at 455. That conclusion is not altered by King's belated and highly doubtful suggestion that he might have been intercepted earlier, with little or no violence. Finally, out of an abundance of caution, we convened the court in the hospital, at King's request, and permitted him to testify in his own defense.

In accordance with the foregoing, this petition for relief under 28 U.S.C. § 2255 is in all respects denied.

So ordered.

Dated: Auburn, N. Y.
July 29, 1977

Lloyd F. MacMahon
LLOYD F. MacMAHON
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----------------------------------x

LOUIS CHARLES KING, :

Petitioner-Appellant, : **NOTICE OF APPEAL**

-vs.- : Docket No. 73 Cr. 9

UNITED STATES OF AMERICA, :

Respondent. :

-----------------------------------x

NOTICE IS HEREBY GIVEN that Louis Charles King, the petitioner above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the final Order entered in this action on July 29, 1977, which denied, in all respects, his petition for relief under 28 U.S.C. § 2255 and his motions for disqualification, pursuant to 28 U.S.C. §§ 144 & 455, and related relief.

New York, New York
August 5, 1977

Yours, ~~etc.~~
HENRY J. BOITEL
Attorney for Petitioner-
Appellant
233 Broadway
New York, New York 10007
(212) RE 2-8104

TO: Office of the Clerk
United States District Court
Northern District of New York
Post Office & Courthouse, Room 306
Utica, New York 13503

Honorable Paul V. French
United States Attorney
Northern District of New York
Federal Bldg. & Courthouse
Syracuse, New York 13202

## TABLE OF CONTENTS

Page

Indictment No. 73 Cr. 9 ------------------------------- A.1

Extracts of Pre-Trial and Trial Proceedings Relating to Sequestration of Jury and King Injuries ----------------------------------- A.9

Newspaper Clippings----------------------------------- A.141

Observer Dispatch (Utica), Sunday morning, February 25, 1973 (P. 1) --------------------- A.141

Observer Dispatch (Utica), Sunday morning, February 25, 1973 (P. 4A) --------------------- A.142

Daily Press (Utica), Monday morning, February 26, 1973 (continued from P. 1) ------- A.144

Daily Press (Utica), Monday morning, February 26, 1973 ---------------------------- A.145

Observer Dispatch (Utica), Monday evening, February 26, 1973 (P. 1) --------------------- A.147

Observer Dispatch (Utica), Monday evening, February 26, 1973 (P. 1) --------------------- A.148

Observer Dispatch (Utica), Tuesday evening, February 27, 1973 ---------------------------- A.150

Observer Dispatch (Utica), Tuesday, February 27, 1973 ---------------------------- A.151

Observer Dispatch (Utica), Tuesday, February 27, 1973 ---------------------------- A.152

Daily Press (Utica), Tuesday, February 27, 1973 ---------------------------- A.155

Observer Dispatch (Utica), Wednesday, February 28, 1973 ---------------------------- A.157

Observer Dispatch (Utica), Wednesday, February 28, 1973 ---------------------------- A.158

Daily Press (Utica), Wednesday, February 28, 1973 ---------------------------- A.159

Daily Press (Utica), Wednesday, February 28, 1973 ---------------------------- A.160

Page

Letter of Assistant United States Attorney Eugene Welch to Chief Deputy Clerk of the District Court, dated March 15, 1973, concerning defendant King's condition ----------- A.161

Letter of Harry H. Love, M.D., F.A.C.S., to Assistant United States Attorney Eugene Welch, dated March 14, 1973, concerning defendant King's condition ----------- A.162

Appellant's brief, filed in the United States Court of Appeals for the Second Circuit, in behalf of Louis Charles King, Jr. ----------- A.163

Government's brief, filed in the United States Court of Appeals for the Second Circuit ----------- A.197

Order of Affirmance, United States Court of Appeals for the Second Circuit (November 28, 1973) ----------- A.226

Petition for a writ of certiorari filed in the Supreme Court of the United States in behalf of petitioners King, Talerico and Mazza ----------- A.227

Order of Supreme Court of the United States denying certiorari (April 22, 1974) ----------- A.257

Application for relief pursuant to 28 U.S.C. § 2255 (filed April 9, 1975) ----------- A.258

Government's memorandum in opposition to 28 U.S.C. § 2255 application (filed May 16, 1975) ----------- A.268

Letter of Louis T. Brindisi to Clerk of the District Court (dated June 18, 1975) ----------- A.280

First Document Annexed (dated June 5, 1975) ----------- A.281

Second Document Annexed ----------- A.282

Letter of Louis King to Louis Brindisi, Esq. (dated June 30, 1975) ----------- A.283

Four return receipts annexed ----------- A.284

Letter of Louis T. Brindisi, Esq. to Louis King (dated July 7, 1975) ----------- A.285

Page

Letter of Louis King to Louis Brindisi, Esq. (dated July 10, 1975) ---------------------------- A.286

Return receipt annexed ---------------------------- A.287

Letter of Louis King to Hon. Lloyd F. MacMahon (dated July 17, 1975) ------------------ A.288

Two return receipts annexed --------------------- A.289

Letter of Louis King to Louis Brindisi, Esq. (dated July 17, 1975) ---------------------------- A.290

Return receipt annexed ---------------------------- A.291

Letter of Louis T. Brindisi, Esq. to Louis King (dated August 21, 1975) --------------- A.292

Letter of Louis King to Louis T. Brindisi, Esq. (dated September 29, 1975) ---------------------- A.293

Return receipt annexed --------------------------- A.294

Memorandum Opinion of Hon. Lloyd MacMahon, denying relief pursuant to 28 U.S.C. § 2255 (dated September 5, 1975; filed September 11, 1975) ----------------------- A.295

Letter of Louis T. Brindisi, Esq. to Hon. Lloyd F. MacMahon (dated October 2, 1975), with letter of Louis T. Brindisi, Esq. to Louis King, annexed -------------------------- A.302

Letter of Louis T. Brindisi to Clerk of United States District Court (dated July 25, 1975), annexed ------------------ A.304

Two return receipts annexed --------------------- A.305

Affidavit of Michelle Malina (dated June 24, 1976) ---------------------------- A.306

Executed Statement of Juror, Mrs. Helen Postal (dated October 26, 1975) ----------------- A.307

Letter of Henry J. Boitel, Esq. to Ronald Wakeel (dated September 8, 1976) ---------------- A.308

Proposed (unexecuted) Affidavit of Ronald Wakeel ------------------------------------- A.309

Page

Letter of Henry J. Boitel, Esq. to
Andrew S. Kowalczyk, Esq. ------------------------ A.316

Return receipt annexed --------------------------- A.318

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

- against -

LOUIS CHARLES KING, JR.
ALBERT J. MARRONE
JAMES VINCENT TALERICO
JACK ZOGBY
CARL J. MAZZA
JOHN DOE, described as a white male in his early 30s, with long blonde or dirty blonde hair, long blonde sideburns, clean-shaven round face with a ruddy complexion, narrow squinting eyes, and heavy build with a large stomach, approximately 5'9" to 6' tall.

CRIMINAL NO. 72-CR-73-

**INDICTMENT**

---

COUNT I

THE GRAND JURY CHARGES:

On or about the 18th day of September, 1972, in the Northern District of New York, LOUIS CHARLES KING, JR. and ALBERT J. MARRONE wilfully and knowingly did make an extortionate extension of credit to J. Schuyler Sackman in the amount of $4,000.00, Louis Charles King, Jr., Albert J. Marrone and J. Schuyler Sackman understanding at the time said extension of credit was made that the rate of interest would be $1,000.00 per month and that delay in making, and failure to make repayment of the same could result in the use of violence or other criminal means to cause harm to the person, reputation and property of J. Schuyler Sackman and others;

King & Marrone

All in violation of Title 18, United States Code, Section 892(a).

COUNT II

THE GRAND JURY FURTHER CHARGES:

On or about the 30th day of October, 1972, in

UNITED STATES COURT OF APPEALS
FILED
NOV 1 1973
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

the Northern District of New York, LOUIS CHARLES KING, JR., JACK [illegible], and JOHN DOE, whose true name is to the Grand Jury unknown and is described as a white male in his early 30s, with long blonde or dirty blonde hair, long blonde sideburns, clean-shaven round face with a ruddy complexion, narrow squinting eyes, and heavy build with a large stomach, approximately 5'9" to 6' tall, wilfully and knowingly did participate in the use of extortionate means to collect from J. Schuyler Sackman an extension of credit in that LOUIS CHARLES KING, JR., JACK [illegible], and JOHN DOE, in collecting and attempting to collect from J. Schuyler Sackman an extension of credit in the amount of $4,000.00 made to J. Schuyler Sackman by LOUIS CHARLES KING, JR. and ALBERT J. MARRONE on or about the 18th day of September, 1972, expressly and implicitly did threaten J. Schuyler Sackman with the use of violence and other criminal means which would cause harm to the person, reputation and property of J. Schuyler Sackman and others in that they did make threatening statements and did menace him with a revolver and a knife;

All in violation of Title 18, United States Code, Section 894.

## COUNT III

THE GRAND JURY FURTHER CHARGES:

On or about the 11th day of November, 1972, in the Northern District of New York, LOUIS CHARLES KING, JR. wilfully and knowingly did participate in the use of extortionate means to collect from J. Schuyler

A 2

Sackman an extension of credit in that LOUIS CHARLES KING, in collecting and attempting to collect from J. Schuyler Sackman an extension of credit in the amount of $4,000.00 made to J. Schuyler Sackman by LOUIS CHARLES KING, JR. and ALBERT J. MARRONE on or about the 18th day of September, 1972, expressly and implicitly did threaten J. Schuyler Sackman with the use of violence and other criminal means which would cause harm to the person, reputation and property of J. Schuyler Sackman and others, that is, LOUIS CHARLES KING, JR. did make threatening statements;

All in violation of Title 18, United States Code, Section 894.

## COUNT IV

THE GRAND JURY FURTHER CHARGES:

On or about the 13th day of November, 1972, in the Northern District of New York, LOUIS CHARLES KING, JR., and JAMES VINCENT TALERICO wilfully and knowingly did participate in the use of extortionate means to collect from J. Schuyler Sackman an extension of credit in that LOUIS CHARLES KING, JR., and JAMES VINCENT TALERICO in collecting and attempting to collect from J. Schuyler Sackman an extension of credit in the amount of $4,000.00 made to J. Schuyler Sackman by LOUIS CHARLES KING, JR., and ALBERT J. MARRONE on or about the 18th day of September, 1972, expressly and implicitly did threaten J. Schuyler Sackman with the use of violence and other criminal means which would cause harm to the person, reputation and property of J. Schuyler Sackman and others, that is, they did collect from J. Schuyler Sackman $350.00 and did make threatening statements;

All in violation of Title 18, United States Code, Section 894.

## COUNT V

THE GRAND JURY FURTHER CHARGES:

On or about the 16th day of November, 1972, in the Northern District of New York, LOUIS CHARLES KING, JR., wilfully and knowingly, did participate in the use of extortionate means to collect from J. Schuyler Sackman an extension of credit in that LOUIS CHARLES KING, JR., in collecting, and attempting to collect from J. Schuyler Sackman an extension of credit in the amount of $4,000.00 made to J. Schuyler Sackman by LOUIS CHARLES KING, JR., and ALBERT J. MARRONE on or about the 18th day of September, 1972, expressly and implicitly did threaten J. Schuyler Sackman with the use of violence and other criminal means which would cause harm to the person, reputation, and property of J. Schuyler Sackman and others, that is, LOUIS CHARLES KING, JR., did make threatening statements;

All in violation of Title 18, United States Code, Section 894.

## COUNT VI

THE GRAND JURY FURTHER CHARGES:

On or about the 18th day of November, 1972, in the Northern District of New York, LOUIS CHARLES KING, JR. and CARL J. MAZZA wilfully and knowingly did participate in the use of extortionate means to collect from

J. Schuyler Sachman an extension of credit in that LOUIS CHARLES KING, JR., and CARL J. MAZZA in collecting and attempting to collect from J. Schuyler Sachman an extension of credit in the amount of $4,000.00 made to J. Schuyler Sachman by LOUIS CHARLES KING, JR. and ALBERT J. MARRONE on or about the 18th day of September, 1972, expressly and implicitly did threaten J. Schuyler Sachman with the use of violence and other criminal means which would cause harm to the person, reputation, and property of J. Schuyler Sachman and others, that is, LOUIS CHARLES KING, JR. and CARL J. MAZZA did make threatening statements and CARL J. MAZZA did strike J. Schuyler Sachman across the face and place a knife against J. Schuyler Sachman's neck;

this was Marrone - wrong

All in violation of Title 18, United States Code, Section 894.

COUNT VII

THE GRAND JURY FURTHER CHARGES:

From on or about the 18th day of September, 1972, and continuously thereafter up to and including the 1st day of December, 1972, in the Northern District of New York, LOUIS CHARLES KING, JR., ALBERT J. MARRONE, JAMES VINCENT TALERICO, JACK ZOGBY, CARL J. MAZZA, and JOHN DOE, who is described as a white male in his early 30s, with long blonde or dirty blonde hair, long blonde sideburns, clean-shaven round face with a ruddy complexion, narrow squinting eyes, and heavy build with a large stomach, approximately 5'9" to 6' tall, all the defendants herein, wilfully and knowingly did combine,

Zogby

conspire, confederate and agree together with each other to willfully and knowingly participate in the use of extortionate means to collect and attempt to collect from J. Schuyler Sackman an extension of credit by performing the following overt acts; in violation of Title 18, United States Code, Section 894.

## OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the defendants and co-conspirators performed the following overt acts:

1. On or about the 18th day of September, 1972, in the Northern District of New York, the defendants LOUIS CHARLES KING, JR. and ALBERT J. MARROLE delivered $4,000.00 to J. Schuyler Sackman.

2. On or about the 30th day of October, 1972, in the Northern District of New York, the defendants LOUIS CHARLES KING, JR., JACK ZOGBY and JOHN DOE did meet with and threaten J. Schuyler Sackman. Zogby

3. On or about the 11th day of November, 1972, in the Northern District of New York, the defendant JAMES VINCENT TALERICO did meet with J. Schuyler Sackman.

4. On or about the 11th day of November, 1972, in the Northern District of New York, the defendant LOUIS CHARLES KING, JR. did meet with and threaten J. Schuyler Sackman.

5. On or about the 13th day of November, 1972, in the Northern District of New York, the defendants LOUIS CHARLES KING, JR., and JAMES VINCENT TALERICO did meet with, make threatening statements to, and collect $350.00 cash from J. Schuyler Sackman.

6. On or about the 15th day of November, 1972, in the Northern District of New York, the defendant LOUIS CHARLES KING, JR., did meet with and make threatening statements to J. Schuyler Sackman.

7. On or about the 18th day of November, 1972, in the Northern District of New York, the defendant LOUIS CHARLES KING, JR., did meet with J. Schuyler Sackman.

8. On or about the 18th day of November, 1972, in the Northern District of New York, the defendants LOUIS CHARLES KING, JR., and CARL J. MAZZA did meet with and threaten J. Schuyler Sackman.

9. On or about the 30th day of November, 1972, in the Northern District of New York, the defendant JAMES VINCENT TALERICO did speak with J. Schuyler Sackman.

10. On or about the 1st day of December, 1972, in the Northern District of New York, the defendant LOUIS CHARLES KING, JR., did speak with J. Schuyler Sackman.

11. On or about the first day of December, 1972, in the Northern District of New York, the defendants LOUIS CHARLES KING, JR. and JAMES VINCENT TALERICO did go to the parking lot of the Howard Johnson's Restaurant, North Genesee Street, Utica, New York, with the intention of meeting J. Schuyler Sackman.

All in violation of Title 18, United States Code, Section 894.

A TRUE BILL

/s/

FOREMAN OF THE GRAND JURY

/s/

UNITED STATES ATTORNEY

A 7

No. 73-CR-9

UNITED STATES DISTRICT COURT

NORTHERN District of NEW YORK

Division

THE UNITED STATES OF AMERICA

vs.

LOUIS CHARLES KING, JR., ALBERT J. MARRONE, JAMES VINCENT TALERICO, JACK ZOGBY, CARL J. MAZZA, and JOHN DOE, et al.

# INDICTMENT

(7 Counts)

VIO: 18 USC 892 and 894. -
Extortionate Extension of Credit.

A true bill,

/s/
Foreman.

Filed in open court this 18 day
of JAN., A. D. 1973

Clerk.

Bail, $

GPO 902-482

THE COURT: You better get him here.

MR. BRINDISI: Yes. I would like to have the government inform us of any agents' names who talked with him.

THE COURT: Yes. I want every agent who worked on this case available and all reports regarding anything the defendants said in the presence of Mr. Marrone since the indictment in this case, or during the investigation leading up to it, at least for the court's inspection in camera.

MR. WELCH: In addition Your Honor, I have one request, I would like to make to the court in the form of a motion, to have a voir dire put to the jury. I show to Your Honor a memorandum of law which might be helpful, if Your Honor entertains the motion. Basically it is a motion to sequester the jury and along with that, if Your Honor grants that motion, to ask the prospective jurymen whether or not this sequestion would impose any hardship on them so that they wouldn't be able to serve.

The basis of my motion is one to protect the rights of these defendants to a fair trial, in that the arrest of these defendants and prior trial motions have had publicity in the local news here and the radio, and it is anticipated in view of the request I received at my office with regard to the starting date of this trial, that they will give this trial daily coverage.

THE COURT: They are entitled to report anything that occurs in court.

MR. WELCH: That's right. In addition to that, in the People vs. Hansen (?) tried in Supreme Court, the jurors received hate mail directly against the defendants, resulting in a mistrial. To avoid this publicity influencing the jurors and, two, hate mail being sent to the jurors and if not causing a mistrial being detrimental to these defendants---

THE COURT: How long will this case take?

MR. BRINDISI: It will be over a week. What happened in the other case, the newspaper reporter published the list of the jurors in the newspapers and somehow or other mail was sent to the jurors and at the second trial, when it was held, in the same case, the judge ordered that no names be published.

THE COURT: I direct to Mr. Evans not to publish the names of the jurors in this case or give it to any newspaper reporters.

MR. WELCH: It certainly would avoid any possibility of a mistrial on those grounds.

THE COURT: I will grant the motion to sequester the jury.

MR. WELCH: All right. Thank you, Your Honor.

THE COURT: All right, let's get going.

JOHN RYAN,

called as a witness in behalf of the defendants, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BRINDISI:

Q Mr. Ryan it is my understanding you are a member of the Federal Bureau of Investigation?

A That's right.

Q Has there been a time or did there come a time in your official duties when you had contact with Albert Marrone, a co-defendant, presently severed in this case, incarcerated at the Oneida County Jail?

of all these defendants, if they found this out through Al Marrone--

THE COURT: But you have to establish that they have. We are holding a hearing. Tell me where the government has the defense of all the defendants?

MR. BRINDISI: I tried to indicate that to the court, that Marrone told them about certain witnesses.

THE COURT: That is not the entire defense. I suggest we finish argument on this thing. You get the transcript from Mr. Jordan and demonstrate exactly what you are talking about, not just give me a lot of hot air. I am not interested in hot air.

MR. BRINDISI: Your Honor, I have another request. I don't know if it is proper at this time. On this motion for sequestering the jury, while we were given the opportunity to look at some law on the first two cases in the government's brief even after the jury entered into their deliberations, it was all right not to have them sequestered.

THE COURT: It is entirely up to the judgments of the judge and in these facts I am exercising my judgment in favor of sequestering, and I won't hear any further argument on it.

MR. BRINDISI: There has been no other case in Oneida County where the jury has ever been sequestered. The publicity given to this case is no different than the publicity given to any other case.

THE COURT: From what I heard this morning there is a very good reason to do it, bearing in mind that I have already read Exhibit 3501, and for that reason I am sequestering the jury. Whether this is the only one where it has ever happened in Oneida County, I care not.

MR. BRINDISI: I just wanted to note my objection.

THE COURT: You made your point. I want you to show me that the prosecution has all the defense even assuming that Marrone knows the defense, I don t see how you trace it to the United States Attorney's Office, and that is all I want on it. Trace it to the prosecution. Surely if there had been a new trial, you came in for a new trial, that is what you would have to do. Unless you do that, I don t see how you have a leg to stand on. As a matter of fact you have to do it whether I grant the motion or not. That is it. I will see you in the morning. Report at 9:30 and see if you could demonstrate the point.

I suggest Mr. Welch you read those cases.

(Whereupon at this point an adjournment was taken until February 21st, 1973 at 9:30 o'clock A.M.)

- - - - - -

to you that occurred yesterday, you may hear it. But I want to tell you that it involves an informer, and if any harm comes to him you will regret the day it happens. You are not talking to some boob.

Now do you want to know what transpired or what occurred here yesterday?

MR. LONGERETTA: No. He is not concerned with what happened.

THE COURT: You understand that they are legal points.

MR. MAZZA: My attorney speaks for me.

MR. LONGERETTA: My client indicates he does not desire to be present at this hearing following what I told him yesterday that our lips were sealed.

THE COURT: What about you?

DEFENDANT KING: I would like to hear it.

MR. SCHOLL: Your Honor, the defendant Zogby does not want to hear it.

THE COURT: Is that agreeable to you. You want to hear the whole transcript of what occurred yesterday?

DEFENDANT KING: I would like to.

THE COURT: All right, read it Mr. Jordan.

(At this point the court reporter read back the testimony given by the witnesses on the previous day).

THE COURT: Do you want a discussion between you and your attorney?

DEFENDANT KING: No.

MR. BRINDISI: Getting back to what we were discussing previously, Your Honor, as I indicated, in fact yesterday after discussing this matter with you, that this entire proceeding be sealed, last night there appeared in the Utica Observer Dispatch on the front page the headlines, "Loan Trial Jurors To Be Isolated Here", and it says:

> "The jury in a loansharking trial in Federal Court in Utica will be isolated, court officials said today.
>
> This will be the first time in recent years that a federal jury will be.
>
> Five area men are accused of violating federal laws in connection with loansharking and extortionate credit. Four of the men were arrested by Federal Bureau of Investigation agents in December

The fifth was extradited from Florida, where he was imprisoned on possessing a stolen drivers license.

The indictment in the case charges the men loaned $4,000 to a Syracuse businessman at $1,000 a month interest.

Charged in the case are Albert J. Marrone, 31, 2643 Dunham Road, who was extradited from Florida; Louis C. King Jr., 43, 5531 Sunrise Terr.; Jack Zogby, 47, 1143½ Leeds Street; James Talerico, 51, 702 Rutger St., and Carl J. Mazza, 28, 1154 Conkling Ave.

Court Officials did not say why the judge, Lloyd F. MacMahon of New York City, decided to sequester the jury.

The judge was to select the jury today. He ordered that the names of the jurors not be published.

Judge McMahon also ordered a separate trial today for Marrone.

The indictment accuses King and Marrone of loaning J. Schuylor Sackman, a Syracuse businessman $4,000 on Sept. 18. It charges the men with threatening

> and menacing Sackman with a knife and a revolver and with striking Sackman and placing a knife to his throat.
>
> Electronic surveillance equipment was used in gathering evidence against the defendants, Assistant U. S. Attorney Eugene Welch said. He said the equipment was used with the permission of one of the defendants.
>
> Federal Judge Edmund Port ordered Welch to turn over copies of the tape recordings to the defendants December 29.
>
> At the same time, Judge Port warned the defendants against any attempts to 'fabricate evidence.'"

Now we held that one thing---

THE COURT: Just a minute Mr. Brindisi. You are misstating the court's directions and rules and a motion to sequester the jury were not held. A hearing was held on what occurred between the F.B.I., agents and Marrone. That was sealed. But obviously I couldn't seal and have not the right to seal a motion to sequester a jury.

MR. BRINDISI: I am sorry, Your Honor. I was under the mistaken impression that that was it.

MR. WELCH: Your Honor---

THE COURT: Before we get to this let's complete his present motion.

MR. BRINDISI: I am trying to show the tactics throughout the entire proceedings.

THE COURT: That had nothing to do with the sequesteration motion, Mr. Brindisi. As I heard the transcript read back again, I had confirmed the impression I had yesterday that about 99 per cent of the questions asked by you and your co-counsel were immaterial to the issues. I directed you to come back here this morning and demonstrate to me what defense specifically the prosecution learned from the F.B.I., in this case through Marrone, as a result of talking to Marrone. That is what you were asked to do.

MR. BRINDISI: That is what I thought I was doing.

THE COURT: Rather than telling me about the prosecution's tactics in general. I don't care about the prosecution's tactics in general. The only thing I am concerned with is whether the defendants get a fair trial.

MR. BRINDISI: As I tried to indicate from the beginning this whole line, even by the questions I had to ask the witnesses, which questions were being taken down by Mr. Welch, those questions gave away most of the defense that I would be using throughout the course of the trial which after that there was an incident yesterday where you put in the evidence 3501, which pertained to certain things which took place yesterday and you read those. Now I don't know whether or not they had to do with any of the defendants in this case. If it did, I don't know whether or not there has been prejudice in summary against the defendants in this trial, because I don t know what is contained in there. There is an informer who gave it to the agent, and we had to ask questions which gives away my defense and the judge has to read certain items and whether or not he should not be in possession peremptory on the alternates?

MR. BRINDISI: That is correct.

THE COURT: All right. Swear the jurors.

(At this point the jurors were sworn).

THE COURT: The court sequesters this jury at this time and they will be in the care and custody of the Marshals throughout the trial. Take them to lunch. Return at 2:15.

(At this point the jury retired from the court room at which a luncheon recess was taken until 2:15 P.M., of the same day).

- - - - -

A The man who was sitting behind Mr. King was a white male, approximately 25 to 30 years old, had a round face with blonde wavy hair, slicked back on the side, had sideburns, was wearing a turtleneck sweater, had squinty eyes.

Q And the other man?

A The other man was dark haired, also had sideburns. His face appeared to me to be pockmarked at the time. He had a large flat nose. He also was wearing a jacket under what appeared to be a turtleneck sweater and was sitting directly behind me.

Q Do you see that man in the courtroom today?

A Yes.

MR. SCHOLL: Your Honor, I object to any evidence regarding the identification of my client, if the identification of my client was made through photographs, and I respectfully submit and request a hearing on that issue in the absence of the jury.

THE COURT: All right. The jury may be excused until tomorrow morning at 10 o'clock. Don't talk about the case. Don't talk about it amongst yourselves. Don't allow anybody to talk to you at home. Don't listen to anything about it on the radio or watch anything about it on television or read anything about it in the newspapers. Any disobedience to these rules will be punishable of contempt of court. Obviously you don't want to do that. Not only that, it will delay this trial and the court would like to make every effort to move this trial along within a reasonable time consistent with the administration of justice. So your cooperation along these lines is very essential and very important and indeed a disobedience of my instructions will have serious effects, and I don't want anybody to be involved with that.

When you come to the Courthouse, go into your jury room and remain there until brought out to the jury box. Be particularly careful in the halls, elevators and around the corridors not to talk about this case.

All right. Good afternoon.

(At this point the jury retired from the courtroom).

MR. SCHOLL, Your Honor, at this time I respectfully move to suppress any evidence that the prosecution may attempt to introduce

A Some of them.

Q Some of them?

A Yes.

Q And I am sure you are trying to be fair and impartial to both sides; is that correct?

A Yes.

Q And you cooperated with the United States Attorney's Office by telling them your side of the story, is that correct?

A Yes.

Q Were you requested by the United States Attorney's Office to allow the defendants' attorneys to talk to you?

A Yes.

Q And you refused to talk to us?

A Absolutely. I was in dire fear of my life.

Q From the attorneys?

A From the attorneys and the people involved.

MR. SCHOLL: Your Honor, I object to this.

THE COURT: Overruled.

BY MR. BRINDISI:

Q Did Mr. Welch tell you that your meeting was to be with the lawyers alone?

A He did tell me that, yes.

Q He did?

A Yes.

Q And did that take place on November 18, 1972?

A Yes.

Q So at your request to have a meeting you had Mr. King go and make arrangements for you to see some people on November 18, 1972; is that correct?

A He said I best talk to the people or I would be in trouble because the note was due on the 18th.

Q Your testimony is that he told you you should talk to the people or did you tell him that you wanted to talk to the people?

A Part of the conversation was one way and part of the conversation was the other way.

Q Isn't it a fact, Mr. Sackman, that he told you in the beginning not to borrow any money?

A Yes he did.

Q That is true?

A Yes.

Q Isn't it true also that he told you that he had no part of that money that was loaned to you?

A That he had no that?

Q That that money was not his loan, was not his money?

A Yes, he told me that.

Q Didn't he tell you if there was any violence against you it wouldn't come from him?

A Yes.

Q Subsequently when you started talking about people coming to your house, didn't he tell you one thing you will have no worry about that I won t be there?

A Yes,

Q Isn't it a fact that every time you had a problem, he interceded on your behalf?

A Yes.

Q In fact when you were, according to your testimony, assaulted in some way, he broke it up?

A Yes.

Q And he told whoever was in the car to lay off, there was no need for anything like that; isn't that true?

A Yes.

Q As a matter of fact he was helping you all the way through?

A I thought so.

Q You thought so. And he himself did nothing to hurt you in any of these conversations you had with him?

A No, he threatened me a couple of times, he was going to be in the middle and he didn't want to be in that position.

Q Was it your understanding when he told you that, that he would have to pay off the money that was loaned to you?

A Yes, or he would be obligated to pay it off.

Q Did he indicate even if he had to pay it off he would cause violence to you?

A No, he never indicated that. He never indicated he was going to do it at all.

Q You said he told you if you did not pay it he would pay it?

A No, he said he was responsible for it.

Q He would have to pay it?

A He said he was responsible for it.

Q Isn't it true, sir, that you kept asking him to get you an extension of time to repay these amounts, and didn't he tell you, "I have nothing to do with it. I am in the middle, because you are placing me in the middle."

A On some occasions he said that, yes.

Q As a matter of fact he told you not to get him involved?

A Yes.

Q As a matter of fact even on December 1st, 1972, in the conversation you had with him he said, "I am not involved with this thing. Don't get me involved." Isn't that what he told you?

A Yes, he said, "I am just a middle man." He didn't say he was not involved.

Q Weren't his words exactly, "Don't put me in the middle?"

A Yes. On other occasions he said he was just the middle

Yes.

Q And this meeting that you had on November 18, 1972, was this with a person who Mr. King had contacted on your behalf?

A I assume so.

Q So in the morning---

MR. LONGERETTA: Objection. He is drawing a conclusion.

THE COURT: Sustained.

BY MR. BRINDISI:

Q In any event the meeting was arranged because of your request; isn't that true?

A No. The loan was due at that time.

Q What I am saying though is you wanted to have a discussion because you could not come up with the money?

A Yes.

Q And you wanted to meet with some people?

A Yes. But on a prior occasion Mr. King told me they wouldn't accept the partial payment I made.

Q Even after that--- in fact you gave him $350.00 to give this to some other people?

A Yes. He said he kept it under a dish in his dining room.

Q Isn't it a fact that he also told you that they wouldn't accept the $350.00. They wanted the entire amount?

A Yes.

Q So you knew he was not going to get the $350.00, he was going to hand it to somebody else?

A That is what he said.

Q And that is what you thought at that time?

A Yes.

Q So that the money was due on the 18th and you didn't have enough to pay, and you asked him to make a meeting with people so you could discuss the repayment; isn't that true?

A Yes.

Q After you had the discussion in the car, at which time you indicated that Mr. M[illegible]za left the car?

A Yes.

Q Did Mr. King tell you at that time, "I told you I had nothing to do with it." Did he tell you that at that time?

A I believe he said something like that.

Q While he was in your car and you were being allegedly attacked, did he forcibly grab the person in the other seat and take him off of you?

A Right.

Q And told him not to do anything like that; is that right?

A Yes.

THE COURT: This is about the fifth time on that Mr. Brindisi. Please progress.

go back to Mr. King's house and have coffee again?

A I don't know.

Q You don't recall?

A No.

Q You still considered him a friend after these assaults?

A Yes I did.

Q So for twelve days before November 18 and November 30th, you had conversations with him which were not recorded, but on November 30th, you had placed upon you again the electronic eavesdropping device?

A Would you say that again?

Q On November 30th you once again had an electronic eavesdropping device?

A On November 30th?

Q Yes, on November 30th?

A I did not have any eavesdropping device on me on November 30th.

Q I am sorry. I think you probably made a telephone call?

A Yes.

Q And that was from your residence in Syracuse?

A Yes.

Q And I believe you testified F.B.I. Agent Kolavar --- is this a conversation where he recorded?

A No.

Q You did this yourself?

A Yes.

Q And was this with your own equipment or with the equipment given to you by the Government?

A The grey electronic notebook.

Q Your equipment?

A My equipment, yes.

Q And at that time I believe you indicated that you called Mr Talerico; is that right?

A Yes.

Q And I believe you testified that you wanted him to get a message to Mr. King that you were going to be in town the following day?

A Yes.

Q My recollection is it was a bad night out and he could not deliver that message?

A Yes.

Q And then on December 1, 1972 do you know now that that was the day that the defendant King was arrested?

A Yes.

Q So on December 1, 1972 you placed a call to Mr. King at the Whitsboro Collision Service; is that correct, sir?

A Yes.

Q And that call was monitored or taped by F.B.I. Agent Kolaver?

A Yes.

Q And in that conversation you indicated that you informed Mr. King that you were going to New York City and you have a $1,000.00 that you wanted to give to the people that loaned you the money; is that right?

A Yes.

Q And did he tell you at that time that he was not going to come down and pick up the money?

A In the first part of the conversation, yes.

Q And you told him something about a business transaction that was going to be taking place in New York City?

A No. He told me he wanted me to do something for him in New York City and I could kill two birds with the one stone.

Q He told you he was not going to be there to pick up the $1,000.00 and then when you told him you were going to New York he told you he would like to see you and have you do something for him in New York City, is that true?

A Yes.

Q And you never kept that meeting?

A No sir.

Q In the meeting of October 30, 1972 you indicated that Mr. Zogby had a knife; is that true?

A Yes.

Q And now was Mr. King in the car at that time?

A Yes.

Q Did he come to your defense at that time also?

A No.

Q He didn't?

A What do you mean by "come to my defense?" Did he pull a knife or anything like that? No.

Q He tell you at that time he had nothing to do with this?

A Yes. He said he was the middle man again.

Q From the time you borrowed the money until December 1st, 1972 you were asking Mr. King for his help?

A I said yes.

Q Right. And he gave it to you?

A Yes.

Q Can you tell us approximately how many conversations you had with Mr. King about anything which was not recorded between September 18, 1972 and December 1st, 1972?

A I have no idea.

Q Would you say there were fifty or more?

A I have no idea.

Q It was almost every other day?

A There were numerous conversations.

Q That were not recorded; right?

A That were not recorded, yes.

MR. BRINDISI: Thank you very much. I

A Yes sir.

Q When describing the incident involving Mr. Zogby, did you say that you had seen him for a moment?

A I probably did. I was quite nervous.

Q And did you say here that you saw him for at least ten minutes?

A Yes sir.

Q At this time to your best recollection, how long was it?

A Ten minutes.

Q There was no doubt in your mind about that?

A No sir.

Q At that same grand jury when you described the blonde man, do you recall saying that he put a gun in your back?

A Yes.

Q Did he put a gun in your back?

A Part of the time.

Q Can you explain what you mean?

A When I first was talking to him, I was facing him this way (indicating) in the back of the car, and then I shifted around this way (indicating) and the gun was facing my back at this time. That is when the knife was put to my neck, and I turned around when Mr. Zogby said to me, "I am very good with the knife."

Q On September 18, Mr. Sackman, did you have any fear of Mr. King?

A Yes.

Q If you did not repay the loan?

A Yes.

Q On each of the meetings at which you testified here, did you have any fear of Mr. King if you did not repay the loan?

A Yes.

Q Now directing your attention to November 11, 1972, you testified that you recorded a telephone conversation. You testified that you wore a body recorder in the meeting with Mr. King. You testified that you wore a body recorder which was off, as well as a transmitter which was on, when you were with Mr. Talorico at Geraci's Restaurant; is that correct?

A Yes sir.

Q Since November 11, 1972, have you heard the tape recording of your conversation with Mr. Talorico at Geraci's?

A Yes sir.

Q Is that tape recording that you heard accurate?

A Yes sir.

Q In this testimony you have also testified concerning seven different tape recorded conversations. Have you heard each one of these tape recorded conversations?

A Yes sir.

Q To your knowledge is each one of those tape recorded

(The following took place in open Court in which the Jury was not present).

THE COURT: Proceed.

MR. [illegible]: The Government is prepared to play the next tape, Exhibit Number Twelve for the Jury.

THE COURT: Call in the Jury.

MR. BRINDISI: Your Honor, at this time I have a motion I would like to address to the Court.

THE COURT: I will hear it in Chambers.

MR. BRINDISI: Thank you.

(The following took place in Chambers at 10:58 A.M. at which all Counsel were present).

THE COURT: If any defendants wish to be present they may.

MR. SCHOLL: Not my defendant.

THE COURT: I don't know. Maybe your client should waive it on the record. Have them also bring in the defendants.

(At this point the Marshall escorted the defendants into the Courts Chambers).

THE COURT: Let the record reflect that the defendants are here, and if you wish to remain, Mr. Brindisi is going to make some motion. I don't know whether or not Counsel plan to make motions or not.

MR. LONGERETTA: Yes sir.

THE COURT: If you wish to remain or if you don't you can waive their presence.

(It was decided that all defendants except the defendant King who was not present, remain).

MR. BRINDISI: As the Court is probably aware, over the weekend and particularly February 24, 1973 an incident occurred in which the defendant Louis Charles King, Jr. was allegedly involved. He was shot at the premises known as the Ramada Inn at Utica, New York by, I have been lead to believe, members of the F.B.I. or members of the State Police. He is presently confined at the St. Lukes Memorial Hospital. He is listed according to the hospital, Dr. Gand, in critical condition. It is my understanding an operation was performed on him. His intestines were removed. A Colostomy was done. In his right leg the arteries had been removed or severed in several instances, and that he is paralyzed on one side. I am informed that he has gained consciousness but that he will not be able to be present at the trial.

In view of that I respectfully move the court at this time for the withdrawl of a juror and a mistrial.

THE COURT: What is the prognosis?

MR. BRINDISI: I really don't know Your Honor. I assume from talking to the doctor he said he did not think he would be able---

THE COURT: Well, when does he think he is going to be out of the hospital?

MR. BRINDISI: As I understand it might be as long as two months, but I am not really sure.

THE COURT: What is your position?

MR. WELCH: It is our position Your Honor that we should proceed in this case. The act that Mr. King was involved with was a deliberate attempt to assault a federal officer and Mr. King should be held responsible for his act. He was armed with a dangerous weapon, assault of a federal

Officer, which brought on his injuries or which prevent his appearing at the trial.

I cite United States vs. Tortoro, 464 F.(2d) at 1202. In which there is a decision in the Second Circuit that it is up to the discretion of the trial judge whether a trial should proceed considering things such as the length of the trial and the witnesses produced---

THE COURT: You don't need to elaborate on it. I hold his absence is due to his own doing and that a mistrial is not in the public interest. The court will state its reasons for its findings in more detail at a later time when I have time to do so. Suffice it to say at this time the facts are fully in the record including the statements by Mr. Brindisi as to danger to his life, and this case will be continued on trial in his absence. I think this is a voluntary waiver of his rights and we will proceed.

MR. BRINDISI: In view of Your Honor's ruling, I would like to have the jury voir dired by the court to determine whether or not they have obtained any knowledge of the incident that occurred over this weekend.

THE COURT: I deny it. The jury has been sequestered during the trial and I am assured by the Marshal that they heard no reports or any incidents over the weekend including the alleged assault by King on the special agent Kelly.

MR. BRINDISI: I say this because I understand they were able to talk to their families.

THE COURT: All telephone calls have been screened through the Marshals, and for that reason I refuse to conduct a voir dire at this time or any time. That is why I sequestered the jury and I directed that they couldn't listen to radio reports, or read newspapers or see television reports.

MR. BRINDISI: I have another request then, in view of Your Honor's ruling. I would like to have the trial conducted at St. Luke's Hospital, in the presence of the defendant, Louis Charles King.

THE COURT: That is not possible.

MR. BRINDISI: In the defense of Louis Charles King, it was my intention to call him as a witness.

THE COURT: We will take his deposition if you wish to do that.

MR. BRINDISI: I do wish to do that.

THE COURT: All right.

MR. BRINDISI: May I ask how the jury will be advised of his absence?

THE COURT: I don't intend to say anything about it. Just let it proceed in its natural course. I think that is the best way to do it. The trial will continue in his absence. Beyond that, I will give no explanation of his absence.

MR. BRINDISI: I have talked to Dr. Millett, who is his physician, and I asked him as to whether or not he would be able to testify and when, and he told me that he felt that tomorrow he would be able to testify in his own behalf.

I also asked him if it was possible to have the jury present during the time he testified. He advised me that there is an auditorium at St. Luke's Center in which there are several chairs and it would be alright tomorrow. I therefore ask that his testimony be taken in front of the jury.

THE COURT: I will reserve decision until I get an opportunity to do some research on the subject. My own inclination would be to have his deposition taken and read to the jury. It would seem to me under the circumstances the government surely would waive his testimony and perhaps you might wish to Mr. Brindisi.

MR. BRINDISI: I thought about that and discussed it with my client. He says if the trial continued he would like to testify in the presence of the jury.

THE COURT: Well, we will see what we can do about it.

MR. LONGERETTA: On behalf of Mr. Carl Mazza, I also join in the motion for a voir dire of the jury.

THE COURT: Any motion made by anyone will innure to the benefit of all. I make the same rulings, and you have the effect of having made the motion with the same ruling.

MR. MANGANELLI: In behalf of James Talerico, I accept to Your Honor's decision as far as the same motion. I have an additional motion relative to bail, but if the Court prefers to defer it to the end of the day---

THE COURT: I would prefer to defer it to the end of the day.

MR. SCHOLL: May the record show I join in the motion in behalf of the defendant I represent.

THE COURT: Yes. Surely. Let's proceed.

(At this point the proceedings took place in open court).

THE COURT: Proceed. Bring the jury in.

THE CLERK: Bring the jury in, Mr. Marshal.

(At this point the jury was escorted into the court room where the following proceedings occurred).

THE COURT: Good morning.

THE JURORS: Good morning.

THE COURT: All right, proceed.

MR. WELCH: Ladies and gentlemen, Mr. Kolevar will play Exhibit 12 which is noted

A No sir, that is outside the scope of our authority. We would have to have local police officers arrange it.

Q Did the F.B.I. have the local police officers arrange it?

A No sir, he asked us not to.

Q But after November 2nd, 1972, Mr. Sackman advised you he had been in receipt of extortionate extension of credit?

A Yes sir.

Q Is that outside the duties of the F.B.I?

A The investigation is.

Q As of September 18, 1972, when you had been advised that he had been given an extortionate extension of credit, did you have authority to come in and investigate the case?

A Yes, but not to protect him.

Q But you have authority to advise local officers to protect Mr. Sackman?

A I didn't do that because it would have placed him in greater jeopardy.

Q It would have placed him in greater jeopardy?

A Yes sir.

Q It was after November 2nd, 1972, that he advised you that his life was in danger; is that correct?

A No sir, that is the first time he told me he had been threatened.

Q That is the first time he told you he had been threatened. Between September 18, 1972 and November 2nd, 1972, had he made any indication to you in any way that his life had been threatened?

A There was no indication that he had been threatened until September 30th.

Q September 30th? Or October 30th?

A I am sorry October 30th.

Q So between September 18, 1972 and October 30th, there was no indication made by him that his life was in danger?

A Yes. He said he was constantly concerned.

Q When was the first time that he told you that?

A That his life was in danger?

Q Yes sir.

A I don't recall the specific date. I met him about six or seven times a week. I know there was real fear in his mind but I don't remember the exact date or his exact comments.

Q Are you indicating to me that after September 30, 1972, you met with Mr. Sackman six or seven times a week?

A Prior to that time.

Q How about after that time, how many times a week did you meet with him?

AFTERNOON SESSION

APPEARANCES: Same as morning session.

MR. LONGERETTA: May I approach the bench? This is my brother. He would like to sit with me at counsel table. He is my partner.

THE COURT: Oh sure.

MR. BRINDISI: Your Honor, I have a motion to make.

THE COURT: Can't it wait until 4:30?

MR. BRINDISI: I don't believe so.

THE COURT: I will take it at 4:30. You can tell me what it is about.

MR. BRINDISI: I would like to request once again that the trial be conducted in the presence of Louis Charles King.

THE COURT: I already ruled on that. I don't intend to rule on it again.

MR. BRINDISI: There are facilities up there in the auditorium for the jury if the trial is moved there.

THE COURT: Is he able to go into the auditorium now?

MR. BRINDISI: I don't know.

THE COURT: You'll have to make that representation to me before I can consider it.

You told me he couldn't testify until tomorrow morning.

MR. BRINDISI: The doctor told me he would be able to move into the auditorium tomorrow morning.

THE COURT: If he is not able to be there that is it. I can't delay the trial. I will have to call the doctor.

MR. BRINDISI: Also, during the luncheon recess I spoke to Attorney Peery, the attorney for Albert [illegible], and he advised me he talked to the United States Marshal today and he was informed that the jury after being told that they were going to Mass yesterday morning, that they were informed that they were going to take a trip to some institution and it was cancelled, and they had activities planned for the last evening, which was also cancelled.

THE COURT: So what?

MR. BRINDISI: He informed me also that the jury received newspapers and when they got them then they were taken back by the Marshal, and as the court knows the incident that occurred over the weekend, it was all over the front page of the newspaper, where the jury could draw any inference.

THE COURT: This is just the same motion you made this morning in a different guise.

MR. BRINDISI: Your Honor, will you voir dire the jury?

THE COURT: No, I will not voir dire the jury.

MR. BRINDISI: I take an exception to your ruling. Thank you.

THE CLERK: Bring the jury in.

(Whereupon at 2:17 P.M. o'clock the jury was returned to the court room).

THE COURT: All right, proceed.

MR. SCHOLL: If the court please, I would like to call Jack Zogby to the stand.

JACK ZOGBY,

called as a witness in his own behalf, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SCHOLL:

Q Mr. Zogby where do you live?

A 1148 Leeds.

Q Keep you voice up so everybody can hear you. Are you married, sir?

A Yes.

Q Do you have any children?

A Three.

Q How old are they?

A Fourteen, eleven and six.

Q Mr. Zogby, do you have a criminal record?

A Yes I do.

Q Tell the court and jury of what crimes you have been convicted?

A In '53 for unlawful entry; '55 for burglary and '69 for burglary.

Q Any other crime that you have been convicted of, to the best of your knowledge?

A No sir.

Q Mr. Zogby, do you own a 1966 Maroon Chevrolet automobile?

A I do.

Q And are you employed?

A Not presently, no.

Q Generally what type of work do you do?

A I am a member of Local 35 on construction.

Q You are a laborer?

A Yes.

Q With the Laborers' Local Union; is that correct?

A Yes.

witnesses, Mr. Brindisi?

MR. BRINDISI: I have the defendant.

THE COURT: Other than King, do you have any?

MR. BRINDISI: No, I do not.

THE COURT: All right. We will recess now until tomorrow morning at 10:00 o'clock. Don't talk about the case, don't let anybody talk to you about it, don't listen to anything on the news cast or television or radio. Don't read anything about it in any newspapers. We are getting down to the wire now. And it is particularly important that you pay attention to my instructions. Good night.

THE JURORS: Good night.

(Whereupon at this point the jury retired from the court room).

THE COURT: All right, Mr. Brindisi, do you have any law now?

MR. BRINDISI: The only law I have is the defendant has the right to take the stand.

THE COURT: Do you have any law on the particular point?

MR. BRINDISI: About going to the hospital?

THE COURT: Yes.

MR. BRINDISI: Not right now I don't.

THE COURT: Does anyone have any objection to going to the hospital? I take it no one does? Does the government object?

MR. WELCH: No objection to taking a deposition.

THE COURT: Not taking a deposition, taking the jury there and hearing the testimony.

MR. WELCH: No objection Your Honor.

THE COURT: Clear the court of spectators.

THE CLERK: All spectators will leave the court room.

(At this point all spectators left the court room)

THE COURT: Have you checked with the Doctor?

MR. BRINDISI: I checked with the Doctor and also the Administrator of the hospital, Mr. Jones, who said he would make available to the Doctor the auditorium of the hospital at 10:00 o'clock tomorrow morning. He said there would be enough room available for as many people as the court feels has to be there.

I told them that there was a probability of between thirty-five and forty people.

I checked with the Doctor yesterday and as I indicated to the court, he told me in his opinion he felt that the defendant could testify. He told me further today I should check with him at 7:00 o'clock this evening and I am going to meet with him at 7:00 o'clock.

THE COURT: You better advise Mr. Evans whether your man will be able to testify tomorrow morning. If he is, court will adjourn to St. Luke's Auditorium at 10:00 o'clock.

MR. BRINDISI: Mr. Jones has requested that the court and whatever members are going to arrive---

THE COURT: Tell the clerk all about the arrangements.

MR. BRINDISI: He said he would have parking space available for the people who would attend.

THE COURT: Is it anticipated that there will be any rebuttal in this case?

MR. WELCH: We are considering at least

one or two rebuttal witnesses Your Honor.

THE COURT: Forget it.

Mr. Manganelli, my rulings on your request to charge are on the margin of this paper that you submitted. Will you look them over so that you know what I am doing. I will hand them to the clerk and they will become part of the record.

Recess until tomorrow morning.

MR. MANGANELLI: I ask if I could be heard?

THE COURT: Before we come to that Mr. Manganelli, in the event we do not proceed there, we will proceed here. We won't know what the situation will be yet. I want you to make sure that the clerk has your telephone number so he can advise you when Mr. Brindisi advises him. The clerk will call you at 8:00 tonight.

MR. BRINDISI: I wonder if I could call the clerk?

THE COURT: No. I want him to call you.

MR. BRINDISI: I will be at the hospital. The number is 79[illegible]-6000.

THE COURT: You leave your numbers with

Mr. Evans.

MR. MANGANELLI: If Your Honor please, I respectfully ask Your Honor at this time to reinstate bail on behalf of the defendent James Talerico. While I am aware of the events over the weekend, nevertheless I feel constrained to say in no way are those events associated with or connected with the defendant, James Talerico.

I am familiar with Your Honor's broad discretionary powers, but I don't feel that this defendent's conduct throughout the course of this trial and before the jury, or his demeanor or past record would in any way indicate to Your Honor, the court, that any conduct of his would in any way impede the orderly process of this trial, or would place the orderly process in danger.

I therefore respectfully request Your Honor that Mr. Talerico be admitted to bail.

MR. LONGERETTA: On behalf of the defendant Mazza, I join in that motion.

MR. MANGANELLI: One other thing, on behalf of the defendant, we would be willing to submit to any type of hearing on the subject that Your Honor would deem fit, and also be subjected to any type of conditions attached to that that Your Honor would see fit.

That is all I have to say Your Honor.

MR. SCHOLL: On behalf of the defendant Zogby, I also join in that motion.

MR. LONGERETTA: Just one thing I would like to add, assuming from the reports in the paper that the authorities had the suspect, and apparently it is not one of these defendants here, I would ask that my defendant be allowed to be admitted to bail.

THE COURT: The record is quite clear, Mr. King was found under circumstances which jeopardize, seriously jeopardize the continuing of this trial and the safety of the court personnel and the F.B.I. Agent. The record is replete with acts of violence and also threats of violence to the life of Mr. Brindisi, and the court will protect the process of the court and therefore will continue to decline to let the defendants out on bail at least until the trial is completed, so that the court personnel and the jury are in safe hands.

We would not have had this condition if the United States Attorney had had the sense to make a motion at the beginning of the trial. This is a serious case and one in which the court should exercise its discretionary powers. A serious attempt was made on the life of the F.B.I. Agent, and it is also for the protection of the defendants as well that we are not going to have anything like that again.

I deny the motion.

THE CLERK: Court stands in recess until 10:00 o'clock tomorrow morning.

(Whereupon at 4:30 P.M. O'clock an adjournment was taken to February 27, 1973, at 10:00 A.M.)

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

- against -

LOUIS CHARLES KING, ALBERT J. MARRONE, JAMES VINCENT TALERICO, JACK ZOGBY and CARL J. MAZZA,

Defendants.

Cr. No. 72-Cr-283

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The trial in the above-entitled matter was continued pursuant to adjournment at the United States District Court in and for the Northern District of New York, at Utica, New York, commencing on February 20th, 1973, before HON. LLOYD MacMAHON, United States District Judge ditting by designation, and a Jury.

* * * * *

(The following took place in St. Luke's Hospital Medical Center at Utica, New York)

JOHN BRADFORD MILLETT

called as a witness, being first duly sworn, was examined and testified as follows:

THE COURT: Dr. Millett, would you state briefly your professional qualifications?

THE WITNESS: Yes. I am a physician and surgeon, a member of the American Board of Surgeons.

THE COURT: Could you give us a little about your background and experience?

THE WITNESS: I went to Harvard College, Harvard Medical School, resident in Massachusetts General Hospital in Boston, practicing here for the last 24 years.

THE COURT: Are you a diplomate in any particular field?

THE WITNESS: Yes, I am a member of the American Board of Surgeons.

THE COURT: How long have you been a member of the American Board of Surgery?

THE WITNESS: Probably twenty years.

THE COURT: Have you attended Louis Charles King recently?

THE WITNESS: Yes I have.

THE COURT: Could you tell me when you first saw him?

THE WITNESS: I can't remember what night. I think it was Friday night.

MR. ERINDISI: Probably Saturday?

THE COURT: Was it Saturday?

THE WITNESS: I know I have been on call and it was late in the evening.

THE COURT: Did you conduct an examination on him?

THE WITNESS: Yes sir. I examined him in the emergency room, at which time he was in a critical state, in shock with various rentilations in the body.

THE COURT: Could you tell me that other injuries he had at that time?

THE WITNESS: At that time he had multiple injuries to the body; gunshot wounds.

THE COURT: Could you be more specific exactly where they were?

THE WITNESS: Evidence of internal injury, blood loss and he was taken to the operating room, as soon as we were able to increase his blood pressure to reasonable levels.

THE COURT: What was the site of the injuries?

THE WITNESS: I don't know if I can enumerate them specifically.

THE COURT: As best you can.

THE WITNESS: There were two in the left shoulder; one in the right axillary; two in the chest; one through the sacrum; one through the end of the lateral aspect of the left knee; one in the exterior left thigh; one in the anterior left thigh; I counted a total of approximately fifteen perforations made. We could pick up eleven or twelve metal objects or buckshot made by .38 special pistol bullets.

THE COURT: What has been your course of treatment or surgery?

THE WITNESS: He was taken to the operating room and further transfusions were given and on opening his abdomen, we were able to remove one bullet from the region of the naval, which we feel entered his left posterior abdomen. This had penetrated the large bowels to the point where perforation was imminent and he was given a colostomy. He had other perforations to his small bowel and it was possible to remove three feet of intestine to take care of these multiple perforations. After probing we found massive hemorrhage which required opening and locating a large vein which we had to completely cover. The artery was completely severed. Two metal particles were removed, one from his chest wall on the right and one over his right axillary, in addition to the one in the navel which we felt it was wise due to his condition to leave at this time and remove at a later date.

THE COURT: When did you last examine him?

THE WITNESS: Last night.

THE COURT: Is he rational?

THE WITNESS: Yes.

THE COURT: How long has he been rational?

THE WITNESS: I would say since the morning after his injury.

THE COURT: Could you state your opinion as to whether he is presently able to testify in the case now on trial in which he is charges as a defendant in a loansharking conspiracy case, which carries a maximum penalty of twenty years if he is convicted, bearing in mind the emotional factors involved in that and the fact that he would have to submit if he testifies not only to direct examination but to cross-examination as well by--- he would be subject to cross-examination by at least five lawyers as well as direct examination by at least one, and that the evidence shows so far that his testimony might be fairly comprehensive and lengthy. Are you in a position, do you have an opinion as to whether he is physically able to testify this morning here at St. Luke's Hospital without impairing his life?

THE WITNESS: I would say if this court recognizes that he is an ill man and that its duration might have to be reasonably short, I would say an hour might be-- I can't say for sure whether he will be able to continue with an hour or not, but I would feel that it would be good to keep his investigation, I mean his interrogation at this time within a reasonable period. And with that understanding, and the understanding of Mr. King if he is tired that he will so state, I feel he is competent to do this and he is quite anxious to do it.

THE COURT: If he should tire would he be able to later resume shortly thereafter?

THE WITNESS: Yes, I see no reason why a rest period of an hour or two he could not go through another additional period.

THE COURT: Would you be able to be at hand while we conduct this, should we give you any signals?

THE WITNESS: I have asked that his nurses be with him during his session here. I am due in surgery at 10 o'clock and immediately thereafter I am due in the hospital in Herkimer.

THE COURT: Is he able to speak?

THE WITNESS: Yes.

THE COURT: Audibly?

THE WITNESS: Yes, in this room he would be able to be heard.

THE COURT: We are going to do this I think in the cafeteria, a converted cafeteria, would he be able to be heard there without electronic assistance of any kind?

THE WITNESS: I feel that he might be less strained if he had a microphone.

THE COURT: All right. We will try to make that available.

What is his appearance at the moment? Is there anything shocking or horrifying in his appearance?

THE WITNESS: No. He has a tube in his nose and interveinus in his arm and he has a bandage around his head which can be reduced, and a small bandage in the back of the head.

MR. BRINDISI: If Your Honor please---

THE COURT: Just a moment Mr. Brindisi. Let me ask the Doctor some questions then you can speak. Will it be necessary to have all these tubes while he is testifying?

THE WITNESS: The tube in his nose must be there.

THE COURT: While he is testifying?

THE WITNESS: While he is testifying, yes.

THE COURT: What about the interveinus feeding?

THE WITNESS: Those things can be removed and replaced should they think it would be in the best interest of the patient.

THE COURT: It would be in the interest of justice if they were removed, but I would have to leave that to you. The more normal his appearance the better.

THE WITNESS: I feel officially his use of the tube doesn't interfer with his speaking or his facial expressions.

THE COURT: You think in the interest of the patient you should keep it there while he testifies?

THE WITNESS: Yes.

THE COURT: All right. You may ask any questions.

MR. BRINDISI: I was going to indicate to Your Honor that I met with the defendant. His bandages on his face have been removed. The only thing that is there are the tubes that the Doctor indicated, and a small bandage.

THE COURT: I will take a look at Mr. King before he is brought out.

Anyone else have any questions?

MR. BRINDISI: No, Your Honor.

THE COURT: All right. Thank you very much Doctor for your cooperation.

(Witness excused)

(At this point the court. Mr. Brindisi and the court clerk left the room and visited the defendant King's hospital room, after which the following occurred outside the presence of the jury).

THE COURT: I just want the record to note that in the presence of Mr. Brindisi, counsel for the defendant King, and the clerk of the court, Mr. James Evans, the court viewed Mr. King to make sure there was nothing in his appearance which would unduly shock the sensitivity of the people on the jury or in any way work undue prejudice on any of the other defendants.

Mr. King as the Doctor described does have a tube in his nose and another interveinus feeding tube on his right arm I believe.

Nothing was said while we were there. I instructed Mr. Brindisi not to have Mr. King speak to me in any way.

Having viewed him, I don't think his appearance is any worse any of us have seen with members of our family, in this day and age, of interveinus feeding and tubes in the nose, or the sort of thing that people look at on television every night of the week, so I don't see that there is any prejudice to anyone from his appearance.

Do you wish to deny or confirm what I said?

MR. BRINDISI: Everything Your Honor said is correct.

THE COURT: Now I want some ground rules here. You all heard what the Doctor said. I want this kept to a tight questioning and I don't want you wandering all over, I want you to stay on the target, relevent, material evidence. I don't want cumulative interrogation. If Mr. Welch asks something there is no point in another asking it. In short, I don't want anything prejudicial.

Mr. Brindisi, I have not the slightest notion what this man is going to say, but it better be material and relevent testimony, otherwise I will be obliged to cut it off. In short, I don't think the incidents of the other evening have anything to do with this case at all, as far as the merits of this case goes, and I think we should avoid getting into that topic.

MR. BRINDISI: I have no intention of getting into that topic.

THE COURT: All right. You all understand it. Be on the ball and let's see if we can do it in a practical way. All of us.

MR. BRINDISI: Thank you.

(The following proceedings took place in the Allen Elender Auditorium at St. Luke's Hospital where all attorneys were present as was the jury and some spectators).

THE COURT: I just want to let this be noted that this is taking place at counsels' table. I just want the record to reflect that members of the family of the defendant have been admitted as spectators at this session of the court, as well as one member of the press.

MR. BRINDISI: May I approach the bench please?

(The following discussion took place at the bench outside the hearing of the jury).

MR. BRINDISI: It is my understanding that we could use an amplifyer to pick up the voice.

THE COURT: Yes.

MR. BRINDISI: Fine. Thank you.

(At this point the defendant King was brought into the court room. The other defendants having previously been taken into the court room).

THE COURT: All right, proceed.

LOUIS CHARLES KING

a defendant, called in his own behalf, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BRINDISI:

Q Louis, you will have to speak into the microphone so everybody can hear you.

A All right.

Q Your full name is Louis Charles King, Jr?

A That is correct

Q Are you married?

A Yes I am.

Q How many children do you have?

A Three children.

Q And how old are they?

A One is twenty, sixteen, thirteen.

Q And are you employed?

problems?

A About Mr. Sackman's problems? No I have not.

MR. WELCH: I have no further questions Your Honor.

THE COURT: Has anyone else any further questions?

MR. MANGANELLI: I have not.

(Witness excused)

(All right, this session of court will now recess and resume at the Federal Court House in the usual part. I would like you to not talk about the case among yourselves or the testimony you heard now. In fact I direct you not to let anybody talk to you about it or listen to any radio or look at any T.V. about it, nor are you to speculate about Mr. King being here. Suffice it to say over the weekend he was injured. Wait until you hear all the case. It is not finished yet, so don't talk about it even among yourselves.)

The Marshals can now take the jury.

(At this point the jury retired from the auditorium).

THE COURT: We will recess now until

2:00 o'clock.

MR. BRINDISI: Your Honor, I have a motion to make. Mr. King has asked me to ask the court that the trial be continued in his presence.

THE COURT: No, I won't do that. Facilities here simply are not adequate to continue the full trial. We are imposing on the hospital as it is and their facilities are not adequate in any respect other than for emergency purposes for which we used them, and that is it.

MR. BRINDISI: May I have an exception please?

THE CLERK: Court stands in recess until 2:00 P.M.

(Whereupon at 11:55 P.M., a recess was taken to 2:00 P.M., of the same day).

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realize that.

Treat Mr. Talerico in the fashion that you would expect to be treated if you were sitting there and he was sitting here. I place him in your hands, and I ask you, I implore you, send him down a free man.

Thank you.

MR. BRINDISI: Your Honor, the court.

THE COURT: Mr. Brindisi.

MR. BRINDISI: Ladies and gentlemen of the jury, I think first of all I would like to thank each and every one of you for listening to all the evidence that has been produced during the course of this trial, and for being so attentive to everything that has occurred throughout the last seven days.

Now you have been selected as a jury and you are not only here because it is your civic duty, but you are here to disperse adjustment. You are here in a temple of justice and you are the ministers of that justice. And only you and you alone can bring back a verdict in this case, a verdict, and word verdict means to tell the truth, which is something that you and only you can consider after hearing all the evidence, after listening to all the summations of counsel, and after taking the law as given to you by the court.

I always tell a jury that I don't want them to bring back a verdict because of sympathy, prejudice and misunderstanding. I tell the jury that I want them to come back with the right verdict for the right reason. I want this to be a logical, reasonable verdict. I want you to come back with a verdict of not guilty on behalf of Louis Charles King, Jr., to each and every count in this indictment.

Now along with being the ministers of justice in this case, you will notice that there is one seat vacant at the counsel table and you have been involved in a story that has taken place, a novel that has been written by the testimony of witnesses during the course of this trial, but the ending to that novel only you and you alone can make. And since Louis Charles King, Jr., can't be here to listen to the summations of counsel and you take the law as given to you by the court, I ask you to do me a favor. I ask you to take the place of Louis Charles King, Jr., and sit here and judge this case as you would want it judged if he really were here.

You have been instructed not to speculate as to what has been happening throughout the course of this trial. You have been sequestered and placed in isolation. You have been instructed that you are not to speculate about this at all. You have been in the custody of United States Marshals, and you have been instructed not to speculate about this at all. You have seen security being placed all over this court house and you have been asked not to speculate about this at all. And you have gone to a hospital this morning and seen a man in a bed who testified, and the judge instructed you on that. Suffice it to say that he was injured over the weekend and you are not to speculate about this at all. I cannot believe that you people can really do that unless you take away your mentalabilities completely. You are asked to sit here---

THE COURT: Mr. Brindisi, you are out of order. Sum up.

Excerpts from Summation of Mr. Brindisi (King's Attorney).

MR. BRINDISI: I apologize Your Honor.

THE COURT: Sum up.

MR. BRINDISI: You are not to speculate or conjecture or wonder about the guilt or innocence of these defendants, and I must also say that I stand here only for the defendant Louis Charles King, Jr. The judge will instruct you that you are to consider each of the defendants separately and distinctly and apply that evidence to that defendant that applies to that defendant.

THE COURT: Mr. Brindisi, please let me instruct them. Don't you know what the function of summing up is?

MR. BRINDISI: I am trying to Your Honor.

THE COURT: Leave the law to the court. I told you any number of times.

MR. BRINDISI: I think it is important ladies and gentlemen that you place yourselves in the position that I asked you to place yourself in and think of this case with the mind of Louis Charles King, Jr. Take yourselves back to that period of time prior to August 1972 when Mr. Sackman advised you that he became an informer for the Federal

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from the footprint.

You are all familiar with this process. You use it in your daily lives. In this process of finding the facts you must not consider anything but the evidence which has been received by the Court in this case. Evidence comes only from the witness stand and the exhibits which were received in evidence. Testimony which has been taken by the Court is not evidence and you cannot consider it in your deliberation.

You are not to draw any inference against any defendant or be influenced in any way by the fact that you have been sequestered through this trial or by other measures which the Court has taken to insure the justice and orderly conduct and completion of this trial. Such matters were not evidence and you must put them entirely out of your mind.

You are not to draw any unfavorable conclusion or inference against King or any other defendant from the fact that the trial has proceeded without King's presence or because King's testimony was taken at a session of this Court held yesterday morning at St. Luke's process.

The orderly process and completion of this trial and the measures necessary to insure it are the exclusive responsibility of Court and are no part of your function. You are therefore to draw no inference against any defendant from the Court's action in that regard.

Now finally I have repeatedly instructed you throughout this trial not to read, or to listen to anything outside the courtroom, not to let anybody talk to you about the case, not to talk about it among yourselves and to wait until all the evidence was in and until you heard the Court's instructions on the law. Now I am sure that you have followed my instructions. But in an excess of caution I tell you again that you must not consider anything that you may have heard, read, seen about this case or any of the defendants other than the evidence which has been received in the courtroom and at our special session yesterday held at St. Luke's Hospital.

Now it is your memory of the evidence that controls here. It is not the way I remember it and not the way counsel remembers it, and I do not intend in this case to sum up the evidence. The evidence has been simple, easily understood and easy to remember. The trial has been relatively short. And counsel yesterday all performed very adequately in summations which you heard throughout the afternoon. So I am sure that the evidence is very clear in your memory.

in which that defendant is named.

Are there any exceptions gentlemen? If so, I will hear you at the Bench.

MR. BRINDISI: I have no exceptions.

MR. MANGANELLI: I have none.

MR. LONGERETTA: Your Honor, may I approach the Bench?

THE COURT: Surely.

(The following took place at the side bar between the Court and Mr. Longeretta outside the hearing of the jury.)

MR. LONGERETTA: The only exception is your denial of the two charges in the form which was submitted to you yesterday.

THE COURT: To that you will have an excepti

MR. LONGERETTA: Thank you, your Honor.

(The following took place in open court.)

MR. SCHOLL: I have no exceptions.

MR. WELCH: No exceptions.

THE COURT: The alternate is excused. Will you please wait in my Chambers.

THE CLERK: Will the guards please step forward who are to guard the jury.

(Mrs. Doris Bauman, Mr. Robert Money, Mr. Frank Dulan and Mr. William Miller were sworn to guard the jury).

THE CLERK: The jury may now retire to consider their verdict.

(Whereupon at 11:45 A.M. o'clock, the jury retired to start their deliberations).

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THE COURT: All spectators will be required to leave the third floor of the building and not come above the first floor during the jury's deliberations. You will file out in a few moments. The clerk will tell you when. You may return at the time of the jury's verdict.

THE CLERK: All spectators may now leave the court room.

(At this point a short recess was taken and the following took place in the court's chambers at 12:05 P.M.)

THE COURT: I have a note from the jury, "Can we have the transcripts of the tapes." I know they are not in evidence, and they were received only as visual aids of the recordings, so I would suggest that I write I am sorry they are not in evidence. If you wish any of the records replayed you may have them.

Mark that Court's Exhibit 1.

(Note marked as Court's Exhibit Number 1).

THE COURT: Let me have a clean piece of paper. I will have my secretary type it.

MR. MANCANELLI: Your Honor, before you

Have each of you explained to your clients what the proceedings are going to be?

MR. MANGANELLI: Yes, Your Honor.

THE COURT: Is it agreeable to all clients?

MR. LONGERETTA: Yes.

MR. SCHOLL: Yes sir.

THE COURT: All right, call in the jury.

(At this point the jury was returned to the court room).

THE COURT: I know you are tired. This has been a long day. You have had a hard day's work and so we will adjourn now until tomorrow morning at 10:00 o'clock. Don't talk about the case once you leave the court house. See if you could get a good night's rest and come back and work on it tomorrow. Don't let anybody talk to you about it. Be particularly careful not to read any papers or listen to any television or newcasts on the radio. I know all of you have been very careful to obey those instructions, and will each passing day it becomes more and more important.

Good night.

THE JURORS: Good night.

Adjournment.

THE COURT: Adjourned to tomorrow at 10:00 o'clock.

(Whereupon at 10:35 P.M. o'clock a recess was taken until March 1, 1973 at 10:00 A.M.)

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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| UNITED STATES OF AMERICA,<br>-against-<br>LOUIS CHARLES KING, ALBERT J. MARRONE, JAMES VINCENT TALERICO, JACK ZOGBY and CARL MAZZA,<br>Defendants. | CR. NO. 72-CR-283 |

The trial in the above-entitled matter continued pursuant to adjournment at the United States District Court in and for the Northern District of New York, at Utica, New York, on March 1, 1973, at 10:00 o'clock A.M., before HON. LLOYD F. MAC MAHON, United States District Judge sitting by designation, and a Jury.

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APPEARANCES:

HON. JAMES M. SULLIVAN, JR., United States Attorney for the Northern District of New York, Federal Building, Syracuse, New York, By: EUGENE WELCH, ESQ., Of Counsel, appearing in behalf of the United States;

-and-

LOUIS T. BRINDISI, ESQ., Attorney and Counsellor at Law, 747 Bleecker Street, Utica, New York, appearing in behalf of Defendant King; and

JOSEPH MANGANELLI, ESQ., Attorney and Counsellor at Law, First National Bank Building, Utica, New York, appearing in behalf of Defendant Talerico; and

JOHN C. SCHOLL, ESQ., Attorney and Counsellor at Law, First National Bank Building, Utica, New York, Assigned Counsel in behalf of Defendant Zogby; and

JOHN LONGERETTA, ESQ., Attorney and Counsellor at Law, 23 Hooper Street, Utica, New York, appearing in behalf of Defendant Mazza.

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(The following proceedings took place in chambers at 11:15 A.M. All attorneys were present).

THE COURT: The jury wants to hear the recording of November 11th between King and Sackman and I have a redacted transcript here. We can save ten minutes if we omit the opening statement which is, "My name is J. Schuyler Sackman. Today is November the 11th, 1972" when we play the recording. Is that alright with all of you?

MR. BRINDISI: Yes, Your Honor.

MR. MANGANELLI: Yes, Your Honor.

MR. SCHOLL: Yes sir.

MR. LONGERETTA: Yes.

THE COURT: All right, we will go out and proceed.

(The following took place in open court at 11:20 A.M., with all attorneys and all defendants, except Defendant King, present).

THE COURT: As I explained to you, I have a note from the jury. They want to hear the tape between Mr. King and Mr. Sackman on November 11, 1972. Proceed. Bring the jury in.

(At this point the jury was returned to the court room where the following took place)

THE COURT: Good morning. I have your note. We will proceed. We will begin on the second page. It will save ten minutes. The first line there is just, "My name is J. Schuyler Sackman", and then we have a long lapse and everybody has agreed to omit that, and we will start on the second page. All right.

JUROR #11: I have the November 16th.

THE COURT: You should have the other one. Go ahead.

(Jury listens to tape Exhibit 8, as follows:

"JS: You know that I'm still waitin for the call, and the call hasn't come in. Now I got a problem. I gotta get a thousand dollars for your tomorrow. I mean Monday. I made an agreement to get it, you know, for those two fellas. And I haven't got all of it.

LK: Yeah.

JS: When my mother was in Florida last week, she bought a condominium down there and he put a six thousand dollar down payment on and the eighteenth is Saturday.

JS: That's right.

LK: Whatta ya gonna do by the eighteenth then?

JS: I don't know, I'm workin. What can I do, I'm gonna work on it. The six grand that I knew was gonna be available I know what they spent for the down payment on that condominium, so I'm gonna have to work on it myself. But I'll get some ju...I'll get some of the, of the juice money and then it's just gonna have to be paid, that's their business isn't it? That's their business isn't it?

LK: Yeah, I guess so.

JS: They gotta have it out to somebody, it might just as well be sittin out to me at the moment.

LK: All right, we'll see what happens tomorrow.

JS: All right.

LK: All right, I'll see ya later, Sky.

JS: Thanks for your help. I'll see ya in the morning.

LK: Yep.

JS: Well, that's UNT.

LK: Huh?

JS: Well, that's UNT. about getting this thing oing UNT, no excuses UNT or something like that.

LK: All you need is, ah, UNT call him back at six.

JS: I'll call em anyway, I wanna tell Jimmy I'm gonna call later. I'll call at seven. UNT thank.

LK: UNT.")

THE COURT: All right, you may resume your deliberation. Leave the transcripts there in the chairs, please.

(Whereupon at 12 o'clock noon the jury retired).

THE CLERK: The court stands in recess. The spectators will please go downstairs.

(Whereupon at this point a recess was taken to 12:15 P.M., when the following occurred in court with all counsel and all defendants except the defendant King being present).

THE COURT: Bring in the jury.

(At this point the jury was returned to the court room).

THE COURT: Proceed.

THE CLERK: Ladies and gentlemen, have you agreed upon a verdict, if so, how do you find and who shall say for you?

JUROR #1: We find the defendants guilty, Your Honor.

THE COURT: On all counts as charged?

JUROR #1: Yes sir.

THE COURT: As to each defendant?

JUROR #1: As to each defendant.

THE CLERK: Harken to your verdict ladies and gentlemen of the jury as the court has recorded it, you say you find them guilty on all counts and so say you all?

THE JURORS: We do.

THE COURT: I want to thank you for the very careful attention that I know you have given to this case; to the very careful attention you have paid to the court's instructions, and I want to caution you again not to talk about this case. If anybody tries to talk to you, with you, you are to contact the F.B.I. immediately.

Now you are all adults and this is a serious matter and if anybody tries to contact you about this case call the F.B.I. immediately. You are excused.

(At this point the jury retired from the court room).

THE CLERK: Court will remain in session.

MR. MANGANELLI: If Your Honor please, at this time would it be proper to make the appropriate motions?

THE COURT: Yes.

MR. MANGANELLI: Then I will defer to Mr. Brindisi.

MR. BRINDISI: On behalf of the defendant King, may we have an opportunity to file motions for judgment of acquittal. I would like to do it in writing and submit it to the court.

THE COURT: I prefer you do it now Mr. Brindisi, if you can at all. I am sure you are well aware of what your motions are. You are also aware that this court is a visiting judge here and I prefer you to make those motions now.

MR. BRINDISI: I would like an opportunity to look at some law to supply to the court on my motion.

THE COURT: You can supply me that later. Let me hear what your motions are now. There are many law books out here so I think either today or tomorrow you can give me the law.

MR. BRINDISI: Basically speaking the motion for judgment of acquittal will be coupled with a motion for a new trial, and the grounds for the new trial will be the conduct of the trial during the absence of the defendant Louis King.

THE COURT: You mean the continuance of the trial?

MR. BRINDISI: The continuance of the trial during the past week in his absence and I feel there is error by the judge not voir diring the jury to determine whether or not the jury did have some notice of the incident which occurred this past weekend. I feel I have to look at some law on voir diring of the jury and the fact the defendant King was not present while the trial continued.

THE COURT: Mr. Brindisi, perhaps it would be better, I see you are not ready, and perhaps it would be better if I heard you at 2 o'clock. That will give you time to get your motion down on paper and organize them so that we can discuss them one at a time calmly and dispassionately and see if there is any merit. And if the rest of you would like to do that it would be alright with me.

MR. LONGERETTA: Yes sir.

THE COURT: If you have any cases you want to cite, just cite them.

MR. BRINDISI: Thank you.

THE COURT: All right.

MR. LONGERETTA: Thank you, Your Honor.

THE COURT: All spectators are to remain until excused by the clerk.

(Whereupon at 12:20 P.M., all spectators were excused from the court whereupon a recess was taken until 2 o'clock P.M., of the same day).

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## AFTERNOON SESSION

APPEARANCES: Same as morning session.

(At 3:00 P.M. o'clock the following occurred in open court with all attorneys and defendants present, except the defendant King).

THE COURT: All right Mr. Brindisi.

MR. BRINDISI: Your Honor, if the court please, at this time on behalf of the defendant, Louis Charles King, I would like to make a motion for a judgment of acquittal and join with it a motion for a new trial. And in support of our motion I wish to indicate to the court what I think are some of the errors that might have been committed during the course of the trial.

Number 1 we feel that the motion for a mistrial after the defendant King was shot and hospitalized should have been granted and that the trial should not have continued since the defendant King was not present during the remainder of the trial.

We feel there was error in the court's refusal to conduct a voir dire of the jury to determine whether or not they have any indications of the events which took place regarding the defendant King and his alleged attempt to assault a government agent, which was highly publicized in the newspapers in this area.

We feel there was error in denying our motion to continue the trial in the defense of the defendant King either at the hospital or other suitable places which the court could have set up.

We feel there was error in getting the defendant's King permission or waiver in writing to continue with the trial during his absence.

And we also feel there was error in denying our offer of proof and not allowing us to show the somewhat criminal business activities of the informer, Sackman, although he had no prior criminal record, and that this could have attacked his credibility.

Also in refusing to grant our motion of dismissal in the indictment on the grounds that an informer working with the government learned the defense of the defendants and conveyed that defense to the United States

Attorney's Office.

We feel that the court before deciding the issue of voluntariliness, being voluntarily absent during the course of the trial, should also have relied on the presumption of innocence that goes with the defendant in many criminal proceedings. And although there were arguments that he might have committed a crime, we still must rely on the presumption of innocence until he is convicted by a jury of that crime.

THE COURT: Are you finished?

MR. BRINDISI: Yes sir. That is basically my application.

THE COURT: Whether to conduct a voir dire of the jury is always a matter of the court's discretion, and in view of the fact that this court had this jury sequestered, and in view of the fact that they were-- the television was turned off, and no newscasts and that they didn't have cause to hear the broadcast, and for the further reason that sequestering the jury is to shield them from publicity prejudicial to the defendants.

Therefore it could only have been a needless waste of the court's time and put further delay on this trial under circumstances where safety was paramount, and in the interest of the jury's safety and the interest of the safety of the court and the witnesses and even defense counsel, and some of the defendants.

So I denied that motion in the exercise of my discretion, and it was wholly unnecessary and useless under the circumstances to conduct such a voir dire.

As for your motion to continue the trial at the hospital, that, as I ruled at the time, was not practical under the circumstances. There simply were no facilities there to adequately secure the defendants, to adequately secure the jury, there was no even a room where the jury could deliberate, and with the other problems, and it was not a place designed to conduct a court. More than that the Doctor told me, or testified, the attending physician testified that King could not testify under the strain for more than periods of about an hour. This would if anything have meant constant interruption of the trial every hour whether or not he was testifying and would have served no purpose in any event in conducting the balance of the trial in the hospital. That again was discretionary and in view of the continuing the trial in his absence, I think the court gave him more than he was entitled to. We went out and heard his testimony. So I deny that motion.

In regard to your contention that there was no written waiver, it is still settled in Illinois v. Allen, United States vs. Tortora, in the Second Circuit, that the defendants can waive their right to be present at the trial by their own misconduct, so therefore no written waiver is necessary.

On your offer to prove Sackman's bad reputation, on your own statement, that would have failed to show that any such misconduct ever resulted in any criminal conviction of any kind. Cases in the Second Circuit, one of which I showed you, Mr. Brindisi-- I have forgotten the name of it-- make it perfectly plain. As for the alleged error in refusal to grant dismissal of the allegations because there was a spy in the camp, the court conducted an extensive hearing, and as I indicated at the conclusion of that hearing in two prior cases, to wit, the Copeland and Caldwell cases, those motions have been made post trial, as you are now making this one. It would have been impossible really for the court to rule on that motion at that time, and once again I had to wait to see what developed at the trial. And at the trial the court is now in a position to state that the defense assumed, argued that the Federal Bureau of Investigation had an informer in the camp of the defense in the guise of a defendant, Marrone specifically, it is perfectly plain to the court that Marrone furnished the government with absolutely nothing of any value whatsoever.

To be more specific there was evidence that the defendants plan to murder the complaining witness, assault federal agents, attempt to bribe a judge, attempt to bribe jurors, and to suborn perjury and furnish other witnesses, all of these were plainly illegal criminal acts which not only lack probative value in this trial but would interfere with the administration of justice and would obstruct this trial. It therefore was the clear duty of the F.B.I., to avail themselves of that information for the legitimate purpose of preventing destruction of justice in ferriting out the commission of crimes.

Insofar as it disclosed the strategy on the part of the defendants to impeach the testimony of Sackman by showing bad conduct not resulting in criminal acts, it plainly was inadmissible.

You recall Mr. Brindisi you were to some lengths in your questions to establish what you were going to do. It was plain to the court then and surely is now having had an offer of proof made by you at the opening of trial plus those on the record at the judicial hearing, that your strategy in impeaching the government witness was not novel, whereas it was not even admissible or probative of any evidence in any way.

Insofar as Mazza's defense goes, after all it was Marrone who made the loan and he was trying to help out Marrone's wife. It really wasn't any defense, and actually it was no defense even on Marrone's testimony and knowledge of it could not in any way have aided the government or impeded the defense since the defense was immaterial. On the contrary it was the admission of a crime. In short anything learned, by having an informer in the defense camp was totally useless, not only to the prosecution but to the defense as well, and therefore could not have been or resulted in a failure of any constitutional right to effective representation by counsel. And for those reasons, and I am not sure but there are many others that could be elaborated upon if the court had the transcript and the time to study it, which would in any way alter my opinion about it and my conclusion about it. So upon all the things that were brought out, the facts and circumstances brought out at the trial, the court can state conclusively that there is no merit whatsoever in that motion.

Now as for your motion for a mistrial or for a severance when King was shot, what do you have to say to that?

MR. WELCH: Your Honor, Mr. King was in fact shot in a voluntary act, committing a crime. As to any ground for mistrial, Your Honor, we fail to see it, and Your Honor has experienced this trial with the rest of us and if anything the result of Mr. King's testifying in the hospital would create sympathy for Mr. King rather than accruing to any other defendant. Finally Your Honor did accomodate Mr. Brindisi's request and Mr. King had an opportunity to present his case.

THE COURT: You see this was Mr. King's voluntary act. His presence at the home of Agent Kelly, isn't that his own voluntary act?

MR. BRINDISI: I can't elaborate on it. I can only indicate to the court that there is a presumption of innocence.

THE COURT: I am asking you if his presence at the home of Agent Kelly on Saturday night was a voluntary act.

MR. BRINDISI: I don't believe so Your Honor. I think if the facts were established and an informer was also involved in that situation, and it was a thing that was fully discussed beforehand with the Federal Bureau of Investigation; that the informer led the defendant King to the residence fully knowing that there was no one present in the house at the time, fully knowing that there were federal officers outside the house ready to shoot Mr. King, and having failed to disclose this to Mr. King at that time.

THE COURT: How would that show it was not a voluntary act?

MR. BRINDISI: I feel that the fact was that the government agencies involved entrapped, if nothing else, Mr. King into going to that residence.

THE COURT: That may be the subject of another trial or charges, but the fact he assaulted a federal officer I don't think that it has to do with a question whether his act was voluntary. King, as the newspapers report, which is all I know about this, and what you and Mr. Welch have said on the record, plus what the clerk advised the court on a Saturday night, and that is that King was seen at the home of Agent Kelly entering an automobile; that he left the car and threw, walked onto the lawn and threw a grenade into the window and when they tried to apprehend him he got back in the car and fled away. Are those the facts or aren't they?

MR. BRINDISI: I really don't think those are the facts.

THE COURT: Then we will have to conduct a hearing to find out what the facts are.

I want someone, Mr. Welch, to testify what was observed what happened at the home of Agent Kelly on Saturday night, who saw what King did at that time. And also someone who can testify as to what if anything King did at the Ramada Inn.

We will take a short recess and you advise the court as to when you have a witness.

MR. WELCH: Yes Your Honor.

THE COURT: Before you get to that, do any of the defendants have any other motions?

MR. BRINDISI: I have one other request.

THE COURT: Brindisi, I asked you if you finished all your motions. Don't you understand English or don't I speak it?

MR. BRINDISI: You do Your Honor, but with your direction to the United States Attorney to conduct a hearing, to get a witness, I would ask that he also be directed to furnish any evidence that might exculpate the defendant King, and also if any informers were used in this instance.

THE COURT: We will cross that bridge when we come to it. I am not conducting a crime trial. I am trying to find out if there were any facts for continuing this trial without King. I am not involved with whether King was guilty or not.

MR. BRINDISI: I think this procedure now is in error. It should have been done prior to the continuance of the trial.

THE COURT: It would have been foolhardy to delay this trial for a hearing in the middle of it, under the circumstances of this case where I passed on all of the objections that were made in this record, which was long before King ever did any act with which he is alleged to have done. I will hold a hearing after we see whether there are any other motions.

MR. MANGANELLI: On behalf of the defendant James Talerico, I again at this time pursuant to Rule 29, renew my motion for judgment of acquittal on the previous grounds stated, to wit, in substance that the government failed to prove a prima facie case as a matter of law against this defendant.

In the alternative I move under Law 33 for a new trial, principally on the grounds contained therein having to do with interest of justice. It appears to me, Your Honor, that the evidence adduced in the People's case and the defendant's case indicate that the verdict of the jury as pertaining to Mr. Talerico was against the weight of the credible evidence. I call Your Honor's attention to the degree of cross-examination, the probative facts that were brought out by Mr. Welch in his cross-examination.

THE COURT: No facts were brought out on any cross-examination.

MR. MANGANELLI: And I urge Your Honor to consider in the interest of justice as far as Mr. Talerico was concerned, and on that basis the verdict was contrary to the weight of the evidence.

THE COURT: There was plainly evidence

in the record from which a reasonable man could reasonably conclude Talerico was guilty.

MR. MANGANELLI: Your Honor, I think as far as interest of justice, I appreciate Your Honor's remarks concerning the evidence of the past weekend, but I am contrained to state that this evidence and the subsequent methods taken in regard to the conduct of trial in my opinion have prejudiced the defendant Talerico. Nothing has been adduced nor anything suggested that Talerico was any part of any violence, or alleged violent act that Mr. King performed, because of this unfortunate event, I feel Mr. Talerico has been caused to suffer from an alleged act of someone else. The prejudice is that the atmosphere and the conduct of this trial changed tremendously from last Friday to Monday. The mere presence of many many more deputy marshals, law enforcement officers in the court room and in close proximity of the jury could have had a direct bearing upon their deliberation. Sometimes, Your Honor, conjecture can be more dangerous than actual knowledge, so that I urge the court to consider this argument in the interest of justice and to set aside this verdict because of it and direct a new trial.

I would also like at this time, without repeating all of the other grounds, I would like to set forth in substance the other grounds which I feel were error, respectfully. The one ground I would like to urge is that Your Honor in an attempt to explain the presence of Mr. King at the hospital indicated in substance, "Suffice it to say he was injured". There again possibly a wrong or prejudicial interpretation could have been taken from that remark by the jury. And in view of the unusual circumstances which I am well aware of, which none of us had anything to do with, were present here, so I suggest that that could have been prejudicial.

I further for the record would like to state that it was error by Your Honor to refuse the defendant's request to inquire if any of the jury, at least of the marshals or people in whose custody the jury was, or any of the persons, who may have come in contact with the jury wherever they were housed. or any employees of the place where they were housed. I can see if Your Honor please failing in regard to actual interrogation of the jurors themselves, but I would like to urge the argument that it was error of the court not to conduct such hearing.

It is for the above reasons that I respectfully move for a new trial.

I would like to urge one other motion to Your Honor, which has nothing to do with a new trial, but a renewal of bail on James Talerico. I again respectfully request Your Honor to reinstate this man pending sentence to bail; that he has on no occasion indicated or done anything, has taken no action verbally or actively which would seem to indicate that he would flee the jurisdiction, or that he would be a danger to any person or officers in this community regardless of who they may be. He has a family here. His record is barren of any wrong doings of any violence. Accordingly, I urge Your Honor to exercise his discretion at this time.

THE COURT: Thank you. There is not the slightest basis other than speculation in anything that you said in support of your argument that the defendant Talerico was denied a fair trial. Or any way prejudiced by any actions of the court to assure the safety of the jury and the completion of this trial.

In light of the circumstances and the events which occurred, and the threats shown on the record and indeed the very evidence on the merits of this case on trial, conversations out of the defendant's own mouth, the court would have been remissed in its duty to have taken one less security measure than it did. Indeed the court may have thought it inadequate under the circumstances. These steps taken to protect the court personnel, witnesses, jurors, all was for the discretion of the court. And it was in the exercise of this discretion that the jury was sequestered. And that was also the reason why there were a large number of marshals in the court throughout this trial. Indeed at one time the defendants moved for a private trial to eliminate the spectators.

In the light of all those facts, I took

the necessary steps to protect the people involved in this trial, all of them, including the defendants.

As to your motion for bail pending sentence, there is no present appeal so I can't consider the motion for bail pending appeal until the appeal is taken. I will treat it as a motion for bail pending sentence and I deny it.

The court is required again to the public interest and to protect the safety of the jury, the court, the witnesses and defense counsel, and the defendants themselves, to revoke bail and remand the defendants to jail. The court has been advised that within a half hour of this jury's verdict, an anonymous telephone call threatening the jury was received by the Federal Bureau of Investigation. The court cannot therefore let any of these defendants out on bail at this time because they are a danger to the community. The evidence in this case shows them to be men of violence and in view of the fact that one of their co-conspirators engaged allegedly, and we will soon find this out, in acts of violence against the resident agent in charge during this trial, that there were numerous threats of violence in this case through criminal acts to obstruct, which the court finds, and now that the defendants are convicted they are not shield by any presumption of innocence, together with the fact that there are possible maximum sentences of prison for twenty years and heavy fines, and for those reasons and the circumstances which are overwhelming, the court would be completely foolish to grant bail pending sentence.

MR. SCHOLL: I respectfully move on behalf of Jack Zogby for judgment of acquittal on the ground the evidence against this defendant was insufficient to sustain a conviction.

I also move respectfully for a new trial based upon similar grounds as advanced by Mr. Brindisi and Mr. Manganelli. I see no reason Your Honor to reiterate them except to say I do make my motion based on similar grounds, with the exception of one additional ground as it affects the defendant Zogby.

I respectfully urge that the court erred in failing to supress the in-court identification of the defendant Zogby because it was based upon an out of court identification that took place of the defendant Zogby.

For those reasons I respectfully move for judgment of acquittal and a new trial.

THE COURT: Your motion is denied for all the reasons I have just enunciated with respect to the other defendants.

MR. LONGERETTA: May it please the court.

THE COURT: Just a moment Mr. Longeretta. And I add to it, there was no evidence of any suggested pre-identification of the defendant Zogby, and there was plenty of evidence which the jury has found that Mr. Zogby attacked the witness in an attempt to collect this loan, with a knife. Adding this to what I said with respect to the other defendants, there is no reason for my not doing this.

MR. LONGERETTA: I naturally join in the motion by other co-counsel and also move that the court set aside the verdict against the defendant Carl J. Mazza. In addition I move for judgment of acquittal for two reasons. Particularly, Your Honor, one being that the verdict was contrary to the weight of the evidence against the defendant Carl Mazza, there being no showing as to how or when Carl Mazza was approached by the witness Sackman, and the testimony of Mazza showed that he was there to help this woman and also that he had no knowledge of the loan made on September 18th, and this was confirmed by Mr. King. Mr. Sackman, of course, his testimony just said he was there and he presumed as to his purpose in being there.

The other reasons being the errors committed on the trial. The court refusing to dismiss the indictment after it was established that an informer was in the camp of the prosecution; the fact that we feel that Carl Mazza did have complete lack of knowledge, did have no knowledge of the loan made on September 18th; that his actions occurred on the one particular day.

The second error that we feel was committed in the course of the trial was a refusal of the court to show the past conduct of Mr. Sackman as indicated by other counsel.

The third error was the court refusing to allow a mistrial after it was disclosed to us that our proposed defense had been disclosed to the prosecution. The defense of Carl Mazza would not have been disclosed on opening statement had this knowledge been furnished to us. We feel Mr. Mazza was compelled by making the statement in camera and the opening statement to the jury, to testify against himself.

The other reason, and this is the only matter in which I intend to add certain facts, is the refusal of the court to conduct a voir dire of the jury after the events occurring on Saturday night. I point out to the court after the event on Saturday night there were certain other events which occurred in this court room. There was a witness who was not able to attend the trial, and the trial was thereafter conducted in the hospital where the court remarked, "Let it suffice to say that the defendant was injured over the weekend." And there was thereafter an increase of security around the jury. The court waived all this aside with the remark, "I will make another statement to the jury. Their sequestration was for this purpose, and the court felt that the purpose of the sequestration was [illegible].

I submit to the court all these events I just enumerated would cause a reasonable person to sit back and say, "There must be a reason." The addition of the guards and the hospital and remarks can only arouse in each individual juror that same suspicion, same fear would apply not only to the defendant and counsel and the court, but certainly to the jury itself. And we feel the court in refusing to conduct any voir dire so as to give them some explanation, that this was error not to do so.

THE COURT: To conduct a voir dire only would serve to heighten and intensify the very feeling that you say was aroused by the court's failure to do so. As I have already said they were shielded purposely. The purpose has been particularly careful that in no way to mention to anything other than what occurred in court or about any defendants in which would in any way have prejudiced another. A jury would have to be fools not to conclude that a man who is hale and hardy in front of them at 5 o'clock on Friday afternoon and in a hospital the following Monday, they can certainly assume later when we took his testimony at the hospital that he had suffered some injury over the weekend. He was not even able to sit up in a chair and the court felt that without disclosing any violence that the court had to tell him the fact that the man was injured over the weekend.

And as to the defendant Mazza, first of all he has admitted his crime on the stand. His lack of knowledge alone are totally immaterial. His denial was obviously incredible. The jury recognized the criminal intent from all the surrounding circumstances and he admitted on the stand that he did use violence and that King was sitting in the back seat while this was going on. This is too much to ask any jury not to believe it.

MR. LONGERETTA: I take an exception.

MR. BRINDISI: In regards to the hearing that Your Honor has ordered, I can only object to it again on the ground that the defendant is not present and that he should be present at all stages of the proceeding and especially if this is going to enter int a determination of whether or not his absence from the courtroom during the course of the trial was a voluntary one.

I just think that I can't ---

THE COURT: Is the defendant able to be here?

MR. BRINDISI: The defendant is in a hospital.

THE COURT: Is he able to be here?

MR. BRINDISI: The defendant is rational, that is all I can tell the court.

THE COURT: I don't intend to conduct the hearing in the hospital. This is a similar matter that involves the exercise of discretion of the court. I intend to conduct the hearing in camera, and it is not a trial in any sense of the word. He has no constitutional right to be present at this hearing under the circumstances, and if he wishes to present any evidence, we will cross that bridge when we come to it.

Proceed. If you object to a hearing, all we need is a sworn statement that he was there, he left the automobile that morning---

MR. BRINDISI: I can't stipulate that.

THE COURT: I understand that.

MR. BRINDISI: I can't waive his rights.

THE COURT: I have no other way of determining the fact but to conduct a hearing. You are the one that made the motions. You have presented no evidence to the court that his absence Monday morning was not voluntary. The burden is on you once we are starting a trial.

MR. BRINDISI: I respectfully accept to Your Honors ruling. I don't believe that I do have the burden in this case.

THE COURT: Once we start a trial he is required to be here at all times, and you have shown nothing to show the court that it was anything but voluntary, and I will now continue to hold the proceedings.

Can you get a witness?

MR. WELCH: I am hoping I can get one, yes Your Honor.

THE COURT: All right. Let [illegible] a recess.

THE CLERK: Court stands in recess.

(Whereupon at this point a short recess was taken after which the hearing was resumed in open court).

THE COURT: This hearing, if there are any agents, will they please leave the courtroom.

MR. BRINDISI: Your Honor may I be heard please.

THE COURT: For just a moment.

MR. BRINDISI: All right. Your Honor, I feel that I can't participate in this hearing. I have not discussed this with my client. I really don't have his authority to proceed without him being present.

THE COURT: You have my direction to be present.

MR. BRINDISI: May I just be heard if Your Honor please. Just one word.

THE COURT: You said quite a few words.

MR. BRINDISI: I don't have his assistance to participate in the conduct of this hearing.

THE COURT: You can tell him about what occurred. We will proceed.

MR. BRINDISI: I just don't want to waive any of his rights.

THE COURT: I understand that.

MR. BRINDISI: I feel that I can't participate.

THE COURT: I direct you to. I don't care what you do, but I direct you to represent him.

MR. BRINDISI: I would like to withdraw my request for the hearing.

THE COURT: You can't withdraw that. Once you make that, absent of a sworn statement of that fact that he was there of his own voluntary, own free will, crossed that lawn, and did whatever he did there. I don't know what he did except what I read in the newspapers and over your objection I will go on with the hearing. If you want to waive the hearing, that is up to you.

MR. BRINDISI: I waive it only because I don't have the authority to conduct --- I would like the record to note I withdraw my request because I don't have authority.

MR. LONGERETTA: On behalf of Carl Mazza I feel for Mr. Brindisi to conduct this hearing at this time would be prejudicial to our defendants. We discussed the matter and we would like our objection to this hearing noted on the record.

THE COURT: I don't know what objection you could conceivably have. It doesn't concern your client. Do other defense counsel want to go on?

MR. MANGANELLI: I do not.

MR. SCHOLL: Neither do I.

THE COURT: Your objection is on the record. It is frivolous but it is noted.

Proceed.

MR. WELCH: Government calls Mr. Bergholtz.

EDGAR A. BERGHOLTZ

called as a witness in behalf of the government, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WELCH:

Q Mr. Bergholtz, directing your attention to February 24, 1973, at approximately 7:45 P.M., did you have occasion to see Louis Charles King, Jr?

A Yes I did.

Q Where did you see him?

A Emerging from a car at Agent Lew Kelly's house.

Q What did you see him do?

A Walk towards the front window, punch in the front window. There was a flash, two shots. There was some shooting and then King got into the car and drove away.

Q Did you have occasion to go into the house thereafter?

A Yes.

Q Did you notice anything in the house?

A Yes.

Q Did you see a grenade in that house?

A I did.

Q Were you in the house earlier and Mr. King arrived?

A Yes.

Q Was there a grenade in the house?

A No.

MR. WELCH: That is all.

THE COURT: Any cross examination?

MR. BRINDISI: I don't have permission of my client to do so.

THE COURT: You have an opportunity to cross examine. Cross examination is refused. You are excused.

(Witness excused)

THE COURT: Do you wish to present any evidence Mr. Brindisi.

MR. BRINDISI: Your Honor, I can only reiterate what I am saying, I don't have authority to participate.

THE COURT: Did you consult with your client today

MR. BRINDISI: I talked with him about the verdict.

THE COURT: The Court was advised that you wished to adjourn motions to be made at three o'clock. You were the one that asked for the hearing.

MR. BRINDISI: I did not ask for a hearing.

THE COURT: The record shows that you did.

MR. BRINDISI: I asked for authority from my client. I withdrew my request.

THE COURT: All right Mr. Brindisi.

The Court finds as it did on the basis of this testimony, which simply confirms the facts which in substance were reported to the Court by the Assistant United States Attorney and by you, Mr. Brindisi, on Monday morning. And not in that precise detail obviously. I think you said that, Mr. Brindisi, if I recall correctly he was involved in a shooting at the Ramada Inn, as I recall, although I will check the record.

But on the basis of this, there is surely enough evidence and facts on which the Court can and does draw the inference that the defendant King left an automobile freely and voluntarily, that he crossed the lawn of Agent Kelly's, trespassed upon his property, that he smashed a window, threw a grenade into the house and fled from the scene.

On the basis of those facts he certainly triggered the chain of events which resulted in his injuries including the shots which were fired.

The Court will render a more complete opinion in a few minutes. Please remain.

(At this point the Court left the courtroom and later returned at which the following occurred).

THE COURT: I wish the record to note at the conclusion of the report of this incident to the court on Monday morning, the court stated for the record he would make more complete findings as soon as it had time to do so. I rather had my hands full in the morning so what I have to say now does not come like from a bolt of lightning from the blue. I have had an opportunity to study the case and the subject since Monday morning and indeed before that, since the court was advised of the incident by Mr. Evans, the Deputy Court Clerk.

There can be no question that a defendant has a constitution right to be present at his own trial. Likewise, there can be no question that a defendant's right to be present at a trial may be waived and that waiver may be implied from the defendant's conduct. See United States v. Tortora, 464 F. 2d 1202 (2 Cir. 1972); Illinois v. Allen, 391 U.F. 97, 106 (1970). The Supreme Court has held that a defendant who knowingly absence himself from the court room during trial leaves the court free to proceed with trial in like manner and with like effect as if he were present. Diaz v. United States, 223 U.F. 442, 445 (1912).

Waiver of a constitutional right, however, must be both knowing and voluntary. The question for us here, therefore, is whether the defendant King's failure to appear in court on Monday morning, February 26, was knowing and voluntary.

King had been present from the opening of the trial on Tuesday, February 20, until 5:00 P.M. on Friday, February 23, when Court adjourned for the weekend. Substantially all of the Government's case had been presented; the principal witness, the victim of the alleged extortionate loan, had testified; F.B.I. surveilling Agents had testified; transcripts of all redacted recorded conversations received in evidence, have been submitted to defense counsel, all defendants, the court and the jury, and all but two of the six redacted tape recordings received in evidence had been played and heard by the Jury.

On Sunday morning, February 25, Mr. James Evans, the Chief Deputy Clerk of the Court for the Northern District, advised the court that on late Saturday night, February 24, the defendant King had engaged in the acts to which the court has just received testimony.

It now appears from the testimony received here today that Mr. King arrived in an automobile at the home of Special Agent Kelly at about 9:40 or 9:30; that Agent Kelly is the Senior and resident Agent of the F.B.I. in Utica; that King got out of the automobile, crossed the lawn, I think he said smashed a front window and threw a hand grenade into the house. The grenade failed to explode and King observed by a witness was injured in an exchange of shots as he got into the car, retreated into the car and fled from the scene. And as Mr. Brindisi reported on Monday morning, shortly thereafter King was apprehended a few miles away in the parking lot of the Ramada Inn motel, and as Mr. Brindisi did not report but as the court then knew that motel was the place where this jury had been sequestered from the beginning of this trial. The court does not know whether

King's arrival there was accidental or coincidental or deliberate. It is of no moment. Again, according to reports both from Brindisi and the Assistant United States Attorney, and it has been widely publicized, shots were exchanged and King was further injured and taken to St Luke's Hospital. We know since then from the testimony in this record that indeed he was taken to St Luke's Hospital; that indeed he was injured; those injuries have been fully detailed by the attending physician, Dr. Millett. His testimony is included in this record.

There was also testimony and evidence in this record on the very first day of this trial that King had made threats on the life of F.B.I. agents; that there was plots to kill the principal witness; to bribe a judge, bribe jurors, and to engage in other criminal acts including subornation of perjury to obstruct this trial.

On the basis of these facts the court surely must conclude that these acts of King were not only voluntary and knowing but also freely and in all probability deliberate. However the court need not find that these acts were deliberate. It is enough that they were free and voluntary. There is not the slightest hint or suggestion that in any sense they were the results of mistake, carelessness, negligence or anything other than a knowing voluntary act. King must bear therefore full responsibility of any injuries which resulted from his own free and voluntary acts.

When the court convened on Monday morning, February 26, Mr. Brindisi, counsel for King and the Assistant United States Attorney Mr. Welch reported the substance of the events of Saturday night, each having an opportunity to give the facts which were heard before.

Counsel for King stating that he had been advised that it would be at least two months before King would be able to return for trial. Counsel for King then moved for a severance and a mistrial, and the Government agrees to continue the trial in the absence of the defendant King on the ground that King had waived his right to be present by his own knowing and voluntary act.

We denied the defendant's motion and granted the government's stating at the time that we would make appropriate findings later when time permitted.

The trial continued to a conclusion without the presence of King except for a special session of the court held at King's request and on motion of his defense counsel at the St. Luke's hospital, at which King testified in his own defense for something like one hour in the presence of the jury.

On the basis of the foregoing facts we find that King's act in going to the home of Special Agent Kelly and in throwing the grenade in the house knowing and voluntary, and that his own misconduct caused the chain of events which resulted in his injuries. The injuries he sustained were the likely and probable consequence of his misconduct and was thus caused by his own knowing and voluntary act. King must therefore take full responsibility for his incapacity to be present at his trial. It was of his own doing.

In the circumstances, King's acts indicate at the very least an intention to obstruct the orderly processes of this court.

No defendant has a unilateral right, by his own conduct, to set the time or circumstances under which he will be tried. See United States v. Bentvena, 319 F.2d, 916 (2d Cir. 1962), Cert. denied, 375 U.S. 940 (1963). If defendants are free to frustrate completion of the trial by their own voluntary acts, the disposition of criminal cases would always be subject to the whims of the defendants who could obstruct justice either by absenting themselves voluntarily or engaging in voluntary conduct certain or highly likely to incapacitate them so that they cannot attend the trial.

Today, more than ever, public interest demands the speedy trial of criminal cases. This circuit has rules requiring prompt disposition of all criminal cases within ninety days, I think, or within 6 months. This case had just about reached the half way mark since indictment. To delay a trial, in this case under circumstances shown in this record, the greater the likelihood that witnesses wouldn't be able to appear or that their rememberance would have faded and their testimony be less than convincing. This is particularly true in this case, where the record from the very beginning of the trial demonstrates a plan by the defendants to prevent or at least obstruct the trial by the means which I have annunciated earlier, bribing a judge, suborning perjury, threatening witnesses, attempting to kill the principal witness and even threatening the life of Mr. Brindisi, the defense attorney.

Surely it would be foolhardy for the court to delay the trial and to wait and give the opportunity for accomplishment of every threat that had been made after one source, as the one here became a reality.

It is too clear for argument that once the threat against an agent, not to mention the jury had been carried out, the court was required and indeed its plain duty was to employ every means at its disposal in order to prevent a recurrence of violence or other criminal acts directed at the court, jurors and counsel and other court personnel and in order to insure the complete administration of justice in this case.

Here, the defendant King had far more than just adequate notice of the charges against him. He had seen and heard almost emphatically the unescapable and overwhelming evidence compiled by the Government against him, largely in the form of his own incriminating statements indelibly recorded on tapes.

He had heard virtually all the Governments evidence. He was clearly advised on Friday night, February 23, that court was adjourned until the following Monday at 10:00 A.M. The evidence is plain and indeed overwhelming that he knowingly, voluntarily and without justification brought his incapacity to be present at this trial upon himself.

In the light of the circumstances the defendant King cannot obstruct the course of justice by voluntary acts which are almost certain and highly likely to result in the serious incapacitating injuries.

His defense counsel, at the direction of the court, remained and availed himself of every opportunity to present King's defense, which he did with the highest skill. No better defense could have been presented under the circumstances.

Finally, on King's motion and after the court ascertained by a personal interrogation of his attending physician that King was physically and mentally competent to stand trial and to testify, and after first viewing King to make certain there was nothing about his appearance which would offend or prejudice the jurors against him, the court convened a special session of this court in the cafeteria at the St. Luke's Hospital; quarters which were made temporarily available through the courtesy of Mr. Jones, Administrator of that hospital, but which obviously could not be made available for the whole balance of the week consistent with the needs of the hospital.

The session was conducted there with all the formalities of a trial in open court. The Judge appeared in his robe. The Jury was present. The clerk, the marshalls, all defendants, and all the defense counsel, the prosecutor and court reporter, the defendants families, spectators, and a representative of the press were present. King testified at length, denying his guilt and giving an innocent explenation of his role in the transaction in issue. A testimony which plainly, this court and jury, rejected.

N.F.

We think that under the extraordinary circumstances shown here, the public interest in completing the trial clearly outweighs the voluntary absence of the defendant King. There was no likelihood that the trial could take place soon with King being present. The facilities at the hospital were inadequate and to move the trial over there to give the defendant King an opportunity to testify in his own behalf under the circumstances, the court probably afforded King more than was his due, because in the very act of moving the jury from the confines and the security requirements of this court, it was the exposure to danger that far outweighed the testimony, the value of the testimony given.

It would have been difficult to reschedule this multi-defendant conspiracy trial, if we were to grant a mistrial. There would be a heavy burden on the Government in undertaking two trials.

The government's witnesses, the jury, defense counsel and other personnel were clearly in substantial jeopardy, as we have already noted and which the record amply demonstrates.

The Government's case rested almost exclusively on the testimony of J. Schuyler Sackman who had already been threatened on numerous occasions. Severance would have added substantially to the opportunity to carry out the threat and would have burdened the government and its witnesses and would have certainly resulted in an unwarranted delay in the expeditious administration of justice.

Accordingly the court denies the defendant's motion for a severance, a continuance or a removal of the trial to St. Lukes Hospital and granted the governments motion to continue the trial in King's absence.

The testimony which this court has heard this afternoon only confirms the wisdom of the court in denying these motions in the first instance, and denying it now. A part of the record has been field to protect the interest of witnesses until such time as the Court of Appeals indicates that it be opened.

MR BRINDISI: I take an exception if Your Honor please.

THE COURT: Yes. sure. You each have it.

I had to set a date for sentencing. Do you have any indication, Mr. Brindisi, when the defendant King is likely to be able to come in from the hospital in a

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

-against-

LOUIS CHARLES KING, ALBERT J. MARRONE,
JAMES VINCENT TALERICO, JACK ZOGBY
and CARL J. MAZZA,

Defendants.

72-CR-283

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The trial in the above-entitled matter was continued pursuant to adjournment at the United States District Court in and for the Northern District of New York, at Utica, New York, on March 23, 1973, at 10:00 o'clock A.M., before HON. LLOYD F. MAC MAHON, United States District Judge sitting by designation, and a Jury.

* * * * *

wheel chair?

MR. BRINDISI: I have no idea, your Honor.

THE COURT: Is he still in intensive care?

MR. BRINDISI: He has been taken out of intensive care. He has been removed to ordinary room. I understand that there are two bullets lodged in his body, which have now been removed by surgery, but I have no idea when he will be available.

THE COURT: As to the Defendant King, the Court will notify you through the Clerk's Office as to the date of sentence. I want the United States Attorney and you to report to the Court not later than March 16th on his condition so that we can set a date as soon as possible.

MR. BRINDISI: Your Honor, would that be to the Clerk of the Court or to your Honor in Chambers?

THE COURT: To the Clerk of the Court. He will advise me. Do we need a pre-sentence report here?

MR. LONGERETTA: Are you making that request?

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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| UNITED STATES OF AMERICA,<br>-against-<br>LOUIS CHARLES KING, ALBERT J. MARRONE, JAMES VINCENT TALERICO, JACK ZOGBY and CARL J. MAZZA,<br>Defendants. | CR. NO. 72-CR-283 |

The sentencing in the above-entitled matter was held pursuant to notice of the United States District Court in and for the Northern District of New York, at Utica, New York, on May 25th, 1973, before Honorable Lloyd F. MacMahon, United States District Judge sitting by designation.

* * * * *

MacMAHON: J.

Good Morning. You may proceed.

MR. WELCH:

If Your Honor please, Mr. King is before your Honor for sentencing this morning after having been convicted on seven counts in the January-February Trial Term before Your Honor.

The seven counts are making an extortion, an extension of credit and five counts of using extortionate means to collect that extension of credit, and one count of conspiracy.

Since Your Honor has heard the testimony in the case and presided over the trial, and has the benefit of a full pre-sentence investigation that we have not seen, we would just respectfully move sentence, with no recommendation.

THE COURT:

Mr. [illegible]?

MR. [illegible]:

I have nothing to comment on.

THE COURT:

MR. KING, do you have anything to say for yourself before the Court pronounces sentence?

DEFENDANT LOUIS CHARLES KING:

Yes, I would like to say that I am 43 years old, and since I was 16 I have worked 23 years steady, and I have a wife and I have three children, and we have done a very good job in raising them. We have the children sitting behind me.

I also would like to speak about the condition of my leg, and my arm, and that I tried to help someone out, and this was the result because I feel, and truthfully felt that this was nothing but an entrapment. He cried for help and he leaned on me for help as during the trial as you seen, and this was the results of it, why I am standing in front of you today on this particular case, the first case.

And of course, as I didn't get a chance to say before, this has happened some times in the past, but it was never brought to the Court on this Mr. Sackman who is supposed to be so lily white, which he wasn't.

It was just an unfortunate thing that he got me involved, and I kept telling him, "don't involve me," but as a friend, I went to his aid.

I would like to have Your Honor consider this in sentencing me.

Thank you.

THE COURT:

Well, Mr. King, of course I have considered all of the evidence in this case, including your testimony. But it is the jury who determines your guilt or innocence, and not the Court, and they rejected that line of argument, and they rejected that evidence, and the evidence here against you is overwhelming.

It shows you to be a cold-blooded, cruel, vicious and violent man as to society.

The Court sentences you to twenty (20) years and fines $10,000.00 on each of Counts I, II, III, IV, V, VI, and VII, to run concurrently with each other.

The defendant is to stand committed until the total fine of $10,000.00 is paid or he is otherwise discharged according to law.

In not imposing consecutive sentences the Court is taking into consideration the fact that you do have a wife and three children. I hope that you will take this time to reflect on your conduct, and straighten out your life. It isn't over with yet, and because you do have them we cannot condone this kind of conduct.

MR. BRINDISI:

If the Court please, at this time, because of the indigency of the defendant, I would just like to have the Court assign me to represent the defendant for the purposes of filing a notice of appeal. He does not have sufficient funds to pay the appropriate filing fee.

* * * * *

# Man Shot, Arrested; FBI Links Him to Try On Local Agent's Life

By SHIRLEY WILLIAMS,
JONAS KOVER,
ED RUFFING

A defendent in a local loan sharking trial now going on in federal court in Utica was shot and hospitalized after a shoot-out in which he allegedly attempted to take the life of a Utica FBI agent last night.

Louis Charles King Jr., 43, of Utica, was arrested by the FBI shortly after the shooting took place at about 10:15 last night at the home of J. Lewis Kelly, 13 Talcott Road, agent-in-charge of the Utica FBI office.

The FBI said that a man approached the Kelly house and threw a grenade through the front window. It did not go off. When he resisted arrest, police began firing at him.

The FBI had been tipped by State Police that an "unknown hoodlum from the Utica area had obtained some hand grenades and planned to throw them into the home of an FBI agent," according to John W. Burns, special agent in charge of the Albany Division of the FBI.

Police, reportedly staked out the Kelly house and adjacent homes, began firing at the car. Neighbors said the car lurched, as though the driver had been hit, and then sped off.

Less than 15 minutes later, police apprehended the suspect at the Ramada Inn. He was identified by the FBI as King.

The Talcott Road and Burrstone Road areas were swarming with state and local police and FBI agents, who cordoned off the scene and held spectators back because of reported live grenades at both sites.

The man identified as King, according to a reporter at the scene, was lying in the driveway of the Ramada Inn. Police, with guns drawn, guarded him while he was searched for grenades.

Police tied a rope around the man, who apparently had been shot, and dragged him some 30 feet because they believed he was lying on a live grenade. Police removed the grenade and the man was removed to an ambulance and taken to a hospital, where he was under police guard.

The grenade was removed from the scene by Sr. Inv. Thomas Gallagher of the New Hartford State Police. U.S. Marshall Frank M. Dulaq also was called to the scene.

(See Shooting, Page 4A)

Photo by George Widman

(Another Picture, 4A)

A 141

CARRIES "EXPLOSIVE" — Senior Inv. Thomas Gallager carries what appeared to be a taped explosive device at the Ramada Inn where law enforcement agents apprehended Louis King last night.

4A—The Observer-Dispatch ★ Utica, N.Y., Sun., Feb. 25, 1973

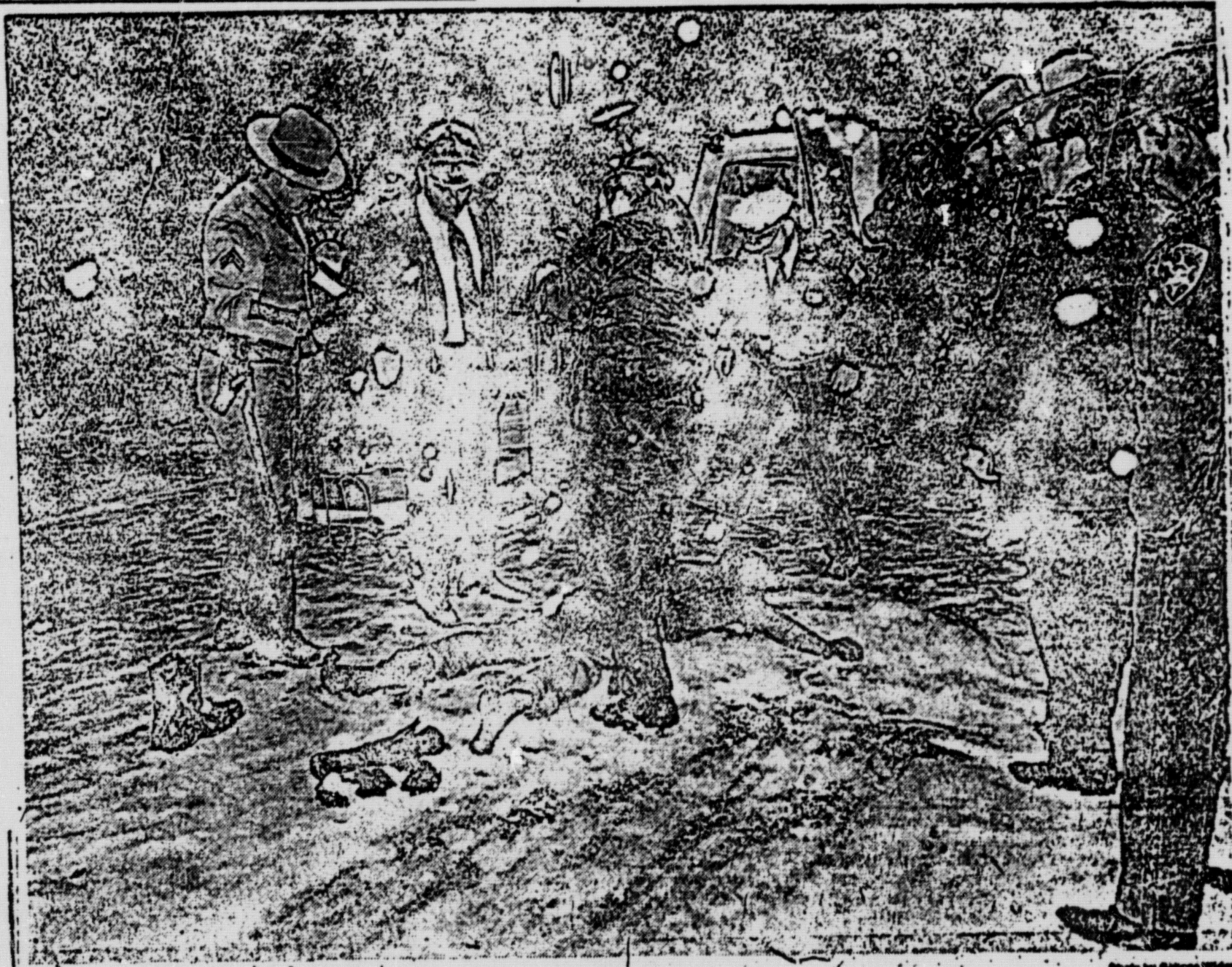


Photo by George Widman

**WATCHING FOR EXPLOSIVES** — Police surround suspect shot at the Ramada Inn near Utica after he had allegedly tried to blow up FBI man Lewis Kelly at Kelly's South Utica home. The man was eventually dragged to an ambulance by a rope, and what appeared to be a taped explosive device was found at the scene, sources said.

# SHOOTING

(From 1A)

Neighbors on Talcott Road said that the Kelly home had been under surveillance by various law enforcement agencies for the past week. Kelly reportedly is associated with the investigation involved in a loan-sharking trial in federal court.

The neighbors said that at about 10:15 last night, a light-colored car with a vinyl roof pulled up by the Kelly house and threw something at the house. They said there was no explosion.

"As soon as the man hurled something out of the car, his car was peppered with bullets," one neighbor said. "His car seemed to lurch, like he had been hit, and then it sped off."

The neighbor, who did not want to be identified, said gun fire had come out of the Kelly house and other homes adjacent to it. The neighbor said he thought a threat had been made on Kelly's life and that police were staked out in the area.

Police would not confirm any reports. All reports were unofficial.

Police were still at the Kelly home at midnight, attempting to defuse the explosive device said to be in the house.

Police referred all information calls to Maj. R. C. Charland, Troop D State Police Commander in Oneida. Charland was not available for details on the incident.

# Driver Is Sought

(Continued from Page 1)

into the parking lot of the Ramada Inn, near the intersection of French and Burrstone roads.

After King was shot, a rope was tied around his body and he was dragged about 30 ... Police found an explosive device, which also did not explode, where King had fallen.

He was taken by ambulance to the nearby hospital, reportedly with a state trooper with gun drawn riding in the rear of the ambulance.

**STATE** and Utica Police say they still are involved in the investigation. They referred all questions to the FBI.

It is still unclear whether the person the FBI says was driving the car was in the car when it arrived at the motel. Also, it is unclear whether King was armed and whether he fired at police at the motel.

The present location of the car was not made public by authorities.

**IT WAS LEARNED** that Kelly, whose home was attacked, was staying at the Ramada Inn Saturday night.

Both explosive devices were removed by Sr. Bureau of Criminal Investigation Inv. Thomas Gallagher of the New Hartford State Police, a head of the State Police bomb squad.

Hospital and Ramada Inn employes said they have been advised by the FBI not to discuss the events.

King told agents when he was arrested Dec. 1 that he was a painter at Marcy State Hospital.

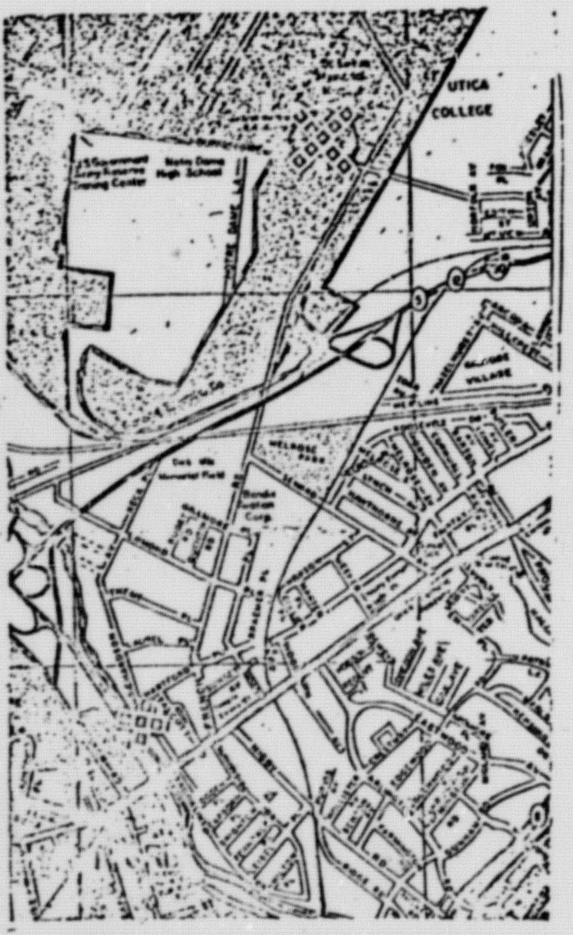
**POSSESSION** of a hand grenade is a federal offense and enforcement of such an act comes under the responsibility of the U. S. Treasury Department. It could not be learned whether that unit had entered the case.

Sr. Inv. Gallagher is one of two area men who have graduated from a bomb disposal school in Alabama. He was reportedly "out of town" for several days. He was in charge of disarming the two grenades Saturday night.

The grenades found Saturday night reportedly were being examined by ballistics officials.

It was reported that the grenades were of the "military" type. FBI agents are checking to see if they were stolen. They would not comment further.

The grenades were believed to be "fragmentary."



WHERE IT HAPPENED — The 'X' at the bottom of the map shows the location of FBI agent J. Lewis Kelly's house on Talcott Road in South Utica. The 'X' at top of map shows location of Ramada Inn in New Hartford. Locations are about one mile apart.

A 144

Gold Cr
Ambulan

Photo by George Widman

**SHOOTING AFTERMATH**—The wounded Louis Charles King Jr., as he was placed in an ambulance Saturday night on his way to St. Luke's-Memorial Hospital Center.

# Swarms of Squad Cars, Cops, Bullets, ... Hush of Sunday

By SUSAN TOMER
and ED RUFFING.

The swarms of squad cars and policemen with guns were conspicuously missing from the Ramada Inn parking lot in MNew Hartford and from the Talcott Road area in Utica Sunday.

Both places were quiet, a little too quiet for even a sunny Sunday afternoon.

**The Ramada parking lot, the scene of Saturday night's hooting of Louis Charles King Jr., was only half-filled. Among the cars were an Oneida County Sheriff's Department patrol car and a car apparently belonging to U.S. Marshal Frank M. Dulan.**

A green Volkswagen was parked near where King, who police called a suspect in the attempted bombing of FBI agent J. Lewis Kelly's home, was shot and wounded. The ice-and snow-covered pavement still bore the marks of activities not common to a parking lot.

Inside the Ramada, motel employes referred all inquiries about the incident to the manager, Ron Wakeel.

Wakeel, watching television with a half dozen persons in the cocktail lounge, politely declined to answer any questions about what happened Saturday night. Yes, he was on duty at the time, Wakeel said, but he really had nothing to tell. He indicated he had been asked not to discuss the incident.

ACROSS THE street at Tony's Shell Service Station, Allen F. Bushey readily talked about how he'd heard three loud noises—"like a car backfiring"—and looked across the street to see police cars jamming the Ramada parking lot and the surrounding area.

Bushey said he didn't know what was going on, and when he crossed Burrstone Road to investigate, he said he almost stepped on a grenade. A police officer told him to get out of the way.

Bushey and another station employe said the wounded man lay on the ground for a long time—"about a half hour," Bushey said—before being moved to an ambulance. Bushey said he thought the man was dead.

ON TALCOTT ROAD, many of the neighbors, like the Kellys themselves, left their homes for the day. Many also had been away the previous evening and, returning home, saw the activity, but knew of the attempted bombing only when they heard the news.

Mrs. George Griffiths, who lives at 21 Talcott Road, was out for the evening with her husband and children. When they returned home, police, who had blocked off the street, told them what happened, Mrs. Griffiths said.

The Griffiths faimily remained inside their home, she said.

**The Richard Kehoe family of 20 Talcott Road, lives diagonally across the street from the Kellys.**

Mrs. Kehoe said she heard "about half a dozen shots," and looked out the window to see several men walking around carrying shotguns. She didn't know who they were but later learned they were FBI agents.

The street was full of cars, she said, and was eventually blocked off.

The Kehoes stayed inside, too.

"You didn't want to go out in the street because you didn't want to hassle them" Mrs. Kehoe said.

Although the neighborhood reportedly had been under surveillance by lawmen for at least a week, Mrs. Kehoe said she "hadn't seen anything unusual."

Mrs. Kehoe said the immediate neighborhood was "very quiet" yesterday. The Kelly home still had a hole in one of its windows.

ANOTHER NEIGHBOR SAID today: threw it the (the explosive device) must have had some baseball ability, it was a perfect strike."

Talcott Road runs from Genesee to Hartford Place and within minutes became the focal point for several lawmen.

The first few minutes after the missile was thrown through the window and staked out agents came out shooting, the Talcott Road neighbors found themselves smack in the middle of something they never anticipated.

**"It was like a late movie," one of them said.**

16 PAGES Utica, N.Y.,

Photos by Jim Armstrong

**BEHIND THE LAW** — Defendants in the loan shark trial in Federal Court were blocked from the camera's view today by U.S. Marshal Frank Dulan, left, and three FBI agents as they crowded into elevator. The trial resumed after tight security measures were taken in the Post Office Building.

## Bail Revoked for 3

# 12 Marshals Called As Trial Resumes

Bail was revoked yesterday for three defendants in a loansharking trial in Federal Court yesterday after a fourth defendant was charged with throwing a hand grenade into the house of the head of the Utica FBI office Saturday night.

The trial resumed today about an hour late under tight security.

The four had been free on bail since they were arrested in December. Bail was revoked by Federal Judge Lloyd Macmahon, who is presiding at the trial.

A fifth person charged has been in the Oneida County jail.

THE TRIAL started at about 11 today. A defense attorney made a motion and all attorneys in the case met with the judge in his chambers.

About 20 minutes later the trial resumed.

The trial began Wednesday and continued under tight security. The jury was ordered isolated.

Security was even tighter this morning.

A metal detector was brought in to screen people before they were allowed to enter the courtroom.

More than a dozen additional federal marshals were brought in.

The Post Office building, where the trial is being held on the third floor, was sealed throughout the night after a caller last night threatened to blow up one floor of the building, according to U.S. Marshal Frank Dulan. It was searched, and no bomb was found.

The third floor was sealed until an hour before the trial was scheduled to begin.

BAIL was revoked around noon yesterday for James Talerico, 51, 702 Rutger St., who had been free on $50,000 bail; Carl J. Mazza, 28, 1154 Conkling Ave., $25,000 bail and Jack (Turk) Zogby, 47, 1148½ Leeds St., $25,000.

Albert Marrone, 31, 2643 Dunham Road, has been held i the county jail.

Charles Louis, King, 43, Marcy, was shot by police yesterday after he reportedly threw a hand grenade through a window in the house of FBI agent J. Lewis Kelly at 1 Talcott Road.

King had been free on $75,000 bail. He was shot in the parking lot of the Ramada Inn, where the jury has been staying during the trial. He was carrying another explosive device, which also did not go off, when he was shot.

THE FIVE defendants are charged with extortion.

They allegedly loaned $4,00 to a Syracuse businessman with $1,000 a month interest. The businessman, J. Schuyler Sackman, said he received the $4,000 last September in a car in the Ramada Inn Parking lot.

King and Marrone loaned th money to Sackman, according to his testimony in the trial so far. Zogby, Mazza and Talerico later threatened him with a knife and a gun when he was late making payment on the loan, Sackman said.

Marrone will be given a separate trial.

**SACKMAN** admitted Thursday he had been an informer for the FBI without pay before he received the loan.

He said he wore a concealed tape recorder and radio transmitter several times when he met with the defendants.

Five tapes were played in court Friday. The final two tapes were scheduled to be played in court today.

The tapes played in court Friday revealed conversations in which Sackman said he would be unable to repay the loan.

In one allegedly held between Sackman and King Nov. 16, Sackman asked for an extension on repaying the loan.

"They gave you two months," King said. "You are very fortunate that you lived the two months without getting hurt.

"You've got a serious problem. They are powerful people, and I told you not to take the money," King reportedly said before telling Sackman he could not have an extension.

Sackman testified he was an unpaid informer for the FBI until the defendants were arrested. Since then, he said, he has been paid $250 a week and he and his family have been under heavy guard.

OD 5/27/73

# Heavy Curtain of Secrecy

In one sense Utica and the area received dramatic publicity in the shooting of Louis Charles King, defendant in a loan sharking case. Pictures of the Saturday evening episode, including one of King sprawled badly wounded in a motel driveway, were carried nationally. It was sensational, although not the sensationalism that Utica or any city likes.

But in another sense, Utica and the area are getting little of the story. The loopholes in the story was vast. Almost all of the big questions are unanswered because the FBI, which is running the police and surveillance activity, are saying nothing, taking the attitude apparently that this is really not the public's business.

The FBI refuses to say this or confirm that. It has requested silence by hospital officials. Utica police headquarters and the local substations of the State Police are referred to the FBI.

Newspapers and others in the news business are accused of being supersensitive on this issue of secrecy. Newspaper people know and understand that the police have grave problems and that this is a difficult, complex case in which violence has, and still does, play a role. But newspapers also know that when there is great secrecy about how and why people act, about why the police act or do not act, rumors grow and color truth.

Hopefully, the FBI, a highly respected police agency, will soon be able to answer fully and freely some vital questions about how Saturday evening's events unfolded, why if they were aware of King's movements—as they appeared to have been—they were not able to arrest him and avert the hazards of a gun confrontation, how he seriously was wounded and so on.

This is not a case of satisfying curiosity but of straightening the lines of a major area happening that seems to be wrapped in confusion and mystery.

5/27/73 C-D

# FBI Replies with 'No Comment' To Newspapers' Questions on Grenade

The FBI replied with a blanket no-comment this morning when the Utica newspapers prepared to ask 25 questions about he hand-grenade attack on a local FBI agent's home and the shooting of a man accused of throwing the grenade Saurday night.

John W. Burns, special agent in charge of the Albany office, said he would make no comment beyond the information already released by the FBI. He said he did not expect to issue any new information unless additional charges were filed aginst Charles Louis King of Marcy.

King was taken to St. Lukes-Memorial Hospital Center after he was shot by the FBI and State Police in the Ramada Inn parking lot in New Hartford.

He was reported in critical condition yesterday.

Burns would not comment on King's condition today. Hospital authorities said all condition reports on King would come from the FBI. Burns said all reports would come from the U. S. Marshal.

AMONG the questions the newspapers wanted to ask was one involving the grenades.

The FBI said it was informed by State Police that a Utica hoodlum had obtained hand grenades and intended to bomb a Utica FBI agent's house. The newspapers wanted to know why were no arrests made based on this information?

The FBI said it was looking for another person in the incident, possibly the driver of the car King was in. The newspapers wanted to know whether this person was in the car when King arrived at the motel and how this person could have escaped.

One explosive device was thrown through the living room window of FBI agent J. Louis Kelly's house and one was found underneath King after he was shot. Neither device exploded.

The newspapers wanted to know whether these devices were hand grenades and whether they were capable of exploding.

The newspapers also had several questions about King's condition.

He was taken to the hospital Saturday night and placed in the intensive care unit. Unofficial reports have described surgery performed on him. No official reports have been issued.

The newspapers wanted to know King's current condition and also wanted to know the FBI's reason for telling the hospital administrator not to release any information about King.

King was to testify today at the hospital.

The newspaper also had several questions about the car King was in. They wanted to know who owned the car and where it is now.

TRIAL ON THE MOVE—Defendants in loansharking-extortion trial as they entered St. Lukes-Memorial Hospital Center this morning. The trial in Federal Court (Post Office Building) was moved to the hospital today where Louis Charles King, one of the defendants, is a patient. No photographs were permitted inside the hospital which the presidng judge declared a temporary courtroom.

OD 2/27/73

# King Testifies for 45 Minutes From Bed in St. Luke's Hospital

By HARVEY SCHWARTZ and KEN SCHAAF

Louis Charles King testified for more than 45 minutes from a hospital bed today in a loan-sharking-extortion case.

The trial had been moved to St. Lukes-Memorial Hospital Center so King could testify.

He is among four men charged in the case.

King was shot by Federal Bureau of Investigation agents and State Police Saturday night in the Ramada Inn parking lot in New Hartford after a hand grenade was thrown into the home of a Utica FBI agent.

**KING** was propped up on a hospital bed with a tube going into his nose from a bottle suspended over his head. He was attended by two nurses.

He spoke so softly a microphone had to be used so people in the room could hear him.

King said he didn't know the FBI was recording conversations between himself and the man he is accused of making an extortionate loan to.

He also said the loan was made in a different place than J. Schuyler Sackman, a Syracuse businessman who received the loan, testified.

King said the money changed hands at the Pinorama Bowling Lanes Sept. 18. Sackman testified last week the money changed hands in a car at the Ramada Inn parking lot.

**THE TRIAL** was moved from the Post Office building in Utica to the hospital auditorium. Hospital Administrator Milton Jones said he was not told the trial would take place at the hospital until 8:10 this morning.

King and three other men, James Vincent Talerico, 51, 702 Rutger St.; Jack Zogby, 48, 1148 Leeds St., and Carl J. Mazza, 28, 1154 Conkling Ave., are charged with loaning Sackman $4,000 at $1,000-a-month interest and threatening Sackman's life when he was late making payment.

2/27/73 CD

# King Testifies from Bed in Hospital

A 154

(Continued from Page 1)

The morning session was recessed shortly before noon after King was cross-examined by the government attorney for two minutes.

**JUDGE** Lloyd MacMahon recessed the trial until 2 p.m. at the federal court.

The judge ordered the jury not to specualte as to why King was in the hospital.

"Suffice it to say he was injured over the weeend," the judge said.

King testified that he had first met Sackman two or three years ago at which time they had slapped each other in an argument.

He said he and Sackman were involved in a number of business deals.

He said he had told Sackman "more than 100 times" not to take the loan.

**YESTERDAY**, the trial took place at the federal court in the Post Office building.

FBI Special Agent Robert Kolivar continued playing tape recordings for the jury made by J. Schuyler Sackman, 40, a former Syracuse life insurance executive and mortgage broker, who told the jury he was an informer for the FBI. Sackman wore complex eavesdropping equipment while meeting with King, Talerico and Mazza.

The first tape played was a telephone conversation between Sackman and King recorded on Dec. 1. King was asked by Sackman to meet him at the Howard Johnson Restaurant so Sackman could pay $1,000 on the $4,000 principal.

Testimony has shown that when King arrived at the restaurant he was arrested by FBI agents.

"I had trouble getting the cash together," Sackman told King.

"I didn't want you to get involved (in getting the loan) so don't blame me," King answered. "I have to blame you a little," Sackman replied.

The final tape played was one allegedly made on Nov. 18. The first part of the tape reported a conversation between King and Sackman. The informer told King he was unable to raise the money to repay the loan. He said he was going to Herkimer to see Robert Castle about borrowing $6,000.

Castle is a car dealer and a former Democratic candidate for Congress. Sackman later reported he was unable to meet with Castle because Castle was out of town.

Sackman also told King that he was unable to borrow money form two other men because he had recently gone bankrupt.

"I am going to end up beaten up," Sackman said, "and I don't want to see those gorillas if I don't pay up."

"I'll have the money on Dec. 9. I was roughed up once and don't want that to happen again," Sackman added.

The final portion of the tape was recorded in a car parked in the Johnson restaurant parking lot later the same day. King, and Mazza were in the car, Sackman testified.

A voice, identified as that of Mazza, told Sackman that he wanted all of the $6,000 by Dec. 1. "Mazza wanted the money or your a dead man," Sackman was told.

Sackman also heard that there were to be no more excuses and that Mazza would find Sackman if he tried to run away. Sackman testified that Mazza slapped him in the face and held a knife to his throat during this conversation. The threats were mixed with obsenities, the tape revealed.

Later when Mazza was on the stand in his own defense, he cried as he told the jury that he remembered nothing of what was said during the meeting. He added he had slapped Sackman after the latter made a suspicious move with his hands.

Mazza said he attempted to collect the money for Marrone's wife, Elizabeth, who was operating a delicatessan on James Street. The business was losing money, Mazza added.

"All I knew was that he owed Albert $6,000," Mazza said. He added he knew nothing about the loan. Mazza also denied having a knife in his possession while talking to Sackman.

Talerico said he knew nothing about the loan until Sackman told him the details while the two were traveling to Schenectady early in November. Talerico was present later in the month when Sackman made a partial payment of $350 to King, he added.

The payment was made in the Whitesboro Collision garage owned by James Ferris, King's brother-in-law, Talerico said, while he was in the garage to have his car fixed.

Zogby testified that he was in the Zogby Steak House, Route 5, Schuyler, on Oct. 30 when Sackman alleged that a knife was held to his throat. Zogby s
had gone to the resta
about 5:30 p.m. and staye
the tavern closed about
a.m.

Mr. and Mrs. Michael Z
1332 Blandina St., owners
steak house, testified that
Zogby, the defendant, had
in the restaurant that n
Jack Zogby had assiste
cleaning up from a party
the previous night.

Michael Zogby said
defendant was "a third
fourth cousin." The final
ness for Zogby was Car
Talerico, a service stat
perator in Schuyler.
estified he also was in the st
ouse on Oct. 30 and pla
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# Federal Attorney Rests Case; King's Condition Still 'Critical'

2/27/73 Press

By KENNETH W. SCHAAF

There was one empty chair yesterday at the defense table as the loan-sharking-extortion trial in Federal Court resumed without one of the defendants.

Louis Charles King, 43, of Marcy remained in critical condition in St. Luke's-Memorial Hospital Center where he underwent surgery early Sunday for gunshot wounds. The FBI said that King was resisting arrest on a charge of attempting to assault a federal officer when shot in the parking lot of the Ramada Inn, New Hartford.

U.S. Attorney Eugene Welch rested his case against King, James Vincent Talerico, 51, of 702 Rutger St.; Jack Zogby, 48, of 1148 Leeds St., and Carl J. Mazza, 28, of 1154 Conkling Ave., charged with attempting to collect an extortionate loan. A fifth defendant, Albert Marrone, 31, of Utica, won a separate trial.

Each defendant then presented his defense. All the defendants now have rested their cases with the exception of King. His attorney, Louis T. Brindisi, wants testimony taken from King and presented to the jury. Federal Judge Lloyd F. MacMahon, who is presiding at the trial, has yet to rule on the request.

It was learned yesterday that bail for Talerico, Mazza and Yagey was revoked by Judge MacMahon on Sunday. Each was free on a $25,000 bail bond posted after their arrests on Dec. 1. This action was taken after King allegedly tossed a grenade into an FBI agent's home Saturday night.

All three are now confined to the Oneida County Jail. Also in the jail is Marrone, who was serving a one-year sentence in Florida for possessing a stolen driver license.

Yesterday an additional 14 U.S. deputy marshals were in court for security. All persons attending the trial had to walk through metal detectors before walking into the courtroom.

It was learned that King might be paralyzed on both sides and that surgeons removed a section of his intestines and some veins from the right leg. There were eight frontal shotgun wounds, a source said.

When court resumed after a weekend recess FBI Special Agent Robert Kolivar continued playing tape recordings for the jury made by J. Schuyler Sackman, 40, a former Syracuse life insurance executive and mortgage broker, who told the jury he was an informer for the FBI. Sackman wore elaborate eavesdropping equipment while meeting with King, Talerico and Mazza.

The first tape played was a telephone conversation between Sackman and King recorded on Dec. 1. King was asked by Sackman to meet him at the Howard Johnson Restaurant so Sackman could pay $1,000 on the $4,000 principal.

Testimony has shown that when King arrived at the restaurant he was arrested by FBI agents.

(See TRIAL, Page 20)

2/28/73 OD

# Extortion Trial Goes To the Jury

A week-old federal loansharking-extortion trial here went to the jury today.

Judge Lloyd F. MacMahon, brought in from New York City for the case, charged the jury this morning.

THE TRIAL returned to the federal courtroom in the Post Office building in Utica today after a morning session yesterday at St. Lukes-Memorial Hospital Center.

A defendant, Louis Charles King Jr., 43, Marcy, who was critically wounded by FBI agents and state police Saturday night, testified from his hospital bed yesterday.

For 45 minutes King answered questions from his attorney, Louis Brindisi. Two nurses brought King into the hospital auditorium, which had been converted into a courtroom for the morning.

King and four other men are accused in a federal indictment with attempting to use extortionate means (either violence or the threat of violence) to collect an extension of credit (a loan).

The other defendants are Albert J. Marrone, 31, of Utica; James Vincent Talerrico, 51, of 702 Rutger St.; Carl J. Mazza, 28, of 1154 Conkling Ave., and Jack Zogby, 48, of 1148 Leeds St. Marrone won a separate trial that will be held later.

King was wounded late Saturday night by a police shotgun blast as he "resisted arrest on a charge of attempting to assault a federal officer," an FBI spokesman said. The wounding occurred in the driveway of the Ramada Inn, New Hartford, shortly after a grenade was tossed into the living room of the South Utica home of FBI agent J. Lewis Kelly.

Yesterday, U.S. Magistrate Robert W. Arthur signed a federal complaint against King charging him with an assault on a federal officer. Conviction carries a maximum sentence of 10 years or a $10,000 fine or both.

King testified he had nothing to do with the $4,000 loan to former insurance man J. Schuyler Sackman, 40, Syracuse. Sackman has told the jury he had been an FBI informer since August. King said, however, he and Sackman have discussed business dealings which included a Panama pipeline and a bank in Honduras. Neither deal was ever completed, he added.

King said he has known Sackman for four years. He admitted slapping the insurance agent two or three years ago in the office of John Longo, former president of the Steelware Corp., Bleecker Street, as Sackman also testified. But King said that Sackman also had slapped him at the same time.

King explained that when he arrived at Longo's office, Longo and Sackman were arguing over money owed to Longo. "John had tears in his eyes," King added.

King said he asked Sackman why he didn't get the money and repay Longo. "One word led to another. I slapped him and he slapped me," King testified.

Longo was convicted last year of a General Business Law violation allegedly connected with the sale of about $920,000 in unregistered securities in the Steelware Corp.

After the slapping incident, Sackman and King became friendly and discussed entering the real estate business together. At one point Sackman gave King a book, "How Real Estate Fortunes Are Made,"

(Continued on Page 18)

2/28/73 OD

# Loanshark Trial

(Continued from Page 17)

which contained a note on the fly leaf saying: "To Lou, Good luck in your new venture. Hope this book helps. Sincerely, Sky," King testified.

The book was offered as evidence by Brindisi.

King said that Sackman came to him to borrow money so he could "take care of personal obligations around his house."

"I never gave him money because I didn't have any," King added.

King's testimony differed from that of Sackman on where the $4,000 loan was turned over. King said Marrone gave the money to Sackman while Sackman and Marrone were sitting at a table in the Pin-O-Rama Bowling Alley. He was sitting at the bar at the time, King said.

Sackman testified earlier that he received the loan on Sept. 18 while King and Marrone were sitting with him in Marrone's car in the Ramada Inn parking lot.

King said he told Sackman he should not take the loan. Later he added he had told Marrone he shouldn't give Sackman the money because he (Sackman) probably couldn't pay it back. But Marrone wanted to take a chance, King added.

King denied that he ever was in a car on Oct. 30 with Sackman and Zogby and a fourth man while Sackman was threatened with a gun and a knife. Sackman told King about the incident the following day, the witness added.

King said that he had talked to Sackman about getting money to repay the loan because "I didn't want to see him get in trouble. He was supposed to be my friend," King testified.

At one point in his testimony, King said, "Jim Talerico didn't have anything to do with the loan in any way or any manner."

King said that he set up a meeting with Sackman for Mazza. At that meeting "Carl ended up giving him (Sackman) a slap and King said Mazza also put his arms around Sackman so the latter couldn't move.

"I jumped in immediately and said it (the slap was all uncalled for. All uncalled for," King said. "I then bawled him (Sackman) out for getting me in trouble," King added.

The meeting was one of seven conversations that were recorded by Sackman for the FBI while the informer was wearing elaborate eavesdropping equipment. The tapes were played for the jury on Friday and Monday.

During a two-minute cross examination of King by Assistant U.S. Attorney Eugene Welch, he admitted he was "a so-called friend of Marrone; that he didn't know who the men were who threatened Sackman on Oct. 30, and that he saw no knife in the hands of Mazza on Nov. 18.

John Longeretta, lawyer for Mazza, was the first to sum up for the jury. He was followed by John C. Scholl, lawyer for Zogby, and Joseph Manganelli, attorney for Talerico.

When it was Brindisi's turn, he told the jury it would be difficult for the members not to speculate about why King was in the hospital, why they are in the custody of the marshal and why there has been tight security around the courtroom.

"And you can't speculate why he (Sackman) was an informer," Brindisi said.

Welch was the last to review his case. He said that the jury had heard the truth on the tapes.

# FBI Refuses Comment to Papers Regarding Grenades in King Case

The FBI replied with a blanket no-comment yesterday when the Utica newspapers prepared to ask 25 questions about the hand-grenade attack on a local FBI agent's home and the shooting of a man accused of throwing the grenade Saturday night.

John W. Burns, special agent in charge of the Albany office, said he would make no comment beyond the information already released by the FBI. He said he did not expect to issue any new information unless additional charges were filed against Louis Charles King of Marc

King was taken to St. Lukes-Memorial Hospital Center after he was shot by the FBI and State Police in the Ramada Inn parking lot in New Hartford.

He was reported in critical condition last night.

Burns would not comment on King's condition yesterday. Hospital authorities said all condition reports on King would come from the FBI. Burns said all reports would come from the U.S. marshal.

AMONG the questions the newspapers wanted to ask was one involving the grenades.

The FBI said it was informed by State Police that a Utica hoodlum had obtained hand grenades and intended to bomb a Utica FBI agent's house. The newspapers wanted to know why were no arrests made based on this information?

The FBI said it was looking for another person in the incident, possibly the driver of the car King was in. The newspapers wanted to know whether this person was in the car when King arrived at the motel and how this person could have escaped.

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He was taken to the hospital Saturday night and placed in the intensive care unit. Unofficial reports have described surgery performed on him. No official reports have been issued.

The newspapers wanted to know King's current condition and also wanted to know the FBI's reason for telling the hospital administrator not to release any information about King.

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The newspaper also had several questions about the car King was in. They wanted to know who owned the car and where it is now.

00- 2/28/73

# King Testifies From Hospital Bed

Press

3/28/73

**By KENNETH W. SCHAAF**

A federal court jury is expected to begin deliberations later today in the loansharking-extortion trial that began here a week ago.

The attorneys in the case summed up their arguments yesterday after the trial moved back to the Federal Building courtroom from St. Luke's-Memorial Hosital Center where Louis Charles King Jr., 43, a critically wounded defendant, testified in his own behalf.

King lay propped up in a hospital bed in the Allen-Calder Wing auditorium. For 45 minutes he answered questions from his lawyer, Louis Brindisi. Two nurses brought King into the 100-by-30 room that had hastily been made into a courtroom at 10:50 a.m.

King's three sons, 20, 16 and 13, sobbed as their father told his story to a sober-faced jury. The jurors were told only that they were not to "speculate as to why Mr. King was in the hospital. It suffices to say that he was injured over the weekend," Judge Lloyd F. MacMahon said.

King spoke slowly into a microphone attached to a loud speaker. At times he closed his eyes and licked his lips. He was being fed intravenously from a bottle hanging above his head.

There also was a tube in King's nose. His complection and color appeared normal. King's attractive wife sat with her three boys and about 15 other relatives of the defendants in the case.

King and four other men are accused in a federal indictment with attempting to use extortionate means (either violence or the threat of violence) to collect an extension of credit (a loan).

The other defendants are Albert J. Marrone, 31, of Utica; James Vincent Talerico, 51, of 702 Rutger St.; Carl J. Mazza, 28, of 1154 Conkling Ave., and Jack Zogby, 48, of 1148 Leeds St. Marrone won a separate trial that will be held later.

### CORRECTION

In yesterday's trial story, a sentence in the Press report said in part: ". . . bail for Talerico, Mazza and Yagey was revoked . . ." The names of the defendants are Talerico, Mazza and Zogby. The Press regrets the inadvertent error.

King was wounded late Saturday night by a police shotgun blast as he "resisted arrest on a charge of attempting to assault a federal officer," an FBI spokesman said. The wounding occurred in the driveway of the Ramada Inn, New Hartford, shortly after a grenade was tossed into the living room of the South Utica home of FBI agent J. Lewis Kelly.

Yesterday, U.S. Magistrate Robert W. Arthur signed a federal complaint against King charging him with an assault on a federal officer. Conviction carries a maximum sentence of 10 years or a $10,000 fine or both.

King testified he had nothing to do with the $4,000 loan to former insurance man J. Schuyler Sackman, 40, Syracuse. Sackman has told the jury he had been an FBI informer since August. King said, however, he and Sackman have discussed business dealings which included a Panama pipeline and a bank in Honduras. Neither deal was ever completed, he added.

King said he has known Sackman for four years. He admitted slapping the insurance agent two or three years ago in the office of John Long, former president of the Steelware Corp., Bleecker Street, as Sackman also testified. But King said that Sackman also had slapped him at the same time.

King explained that when he arrived at Longo's office, Longo and Sackman were arguing over money owed to Longo. "John had tears in his eyes," King added.

King said he asked Sackman why he didn't get the money and repay Longo. "One word led to another. I slapped him and he slapped me," King testified.

Longo was convicted last year of a General Business Law violation allegedly connected with the sale of about 920,000 in unregistered securities in the Steelware Corp.

After the slapping incident, Sackman and King became friendly and discussed entering the real estate business together. At one point Sackman gave King a book, "How Real Estate Fortunes Are Made," which contained a note on the fly leaf saying: "To Lou, Good luck in your new venture. Hope this book helps. Sincerely, Sky," King testified.

The book was offered as evidence by Brindisi.

King said that Sackman came to him to borrow money so he could "take care of personal obligations around his house."

"I never gave him money

(See TRIAL, Page 40)

# Trial

(Continued from Page 21)

because I didn't have any,'" King added.

King's testimony differed from that of Sackman on where the $4,000 loan was turned over. King said Marrone gave the money to Sackman while Sackman and Marrone were sitting at a table in the Pin-O-Rama Bowling Alley. He was sitting at the bar at the time, King said.

Sackman testified earlier that he received the loan on Sept. 18 while King and Marrone were sitting with him in Marrone's car in the Ramada Inn parking lot.

King said he told Sackman he should not take the loan. Later he added he had told Marrone he shouldn't give Sackman the money because he (Sackman) probably couldn't pay it back." But Marrone wanted to take a chance," King added.

King denied that he ever was in a car on Oct. 30 with Sackman and Zogby and a fourth man while Sackman was threatened with a gun and a knife. Sackman told King about the incident the following day, the witness added.

King said that he had talked to Sackman about getting money to repay the loan because "I didn't want to see him get in trouble. He was supposed to be my friend," King testified.

At one point in his testimony, King said, "Jim Talerico didn't have anything to do with the loan in any way or any manner."

King said that he set up a meeting with Sackman for Mazza. At that meeting "Carl ended up giving him (Sackman) a slap and King said Mazza also put his arms around Sackman so the latter couldn't move.

"I jumped in immediately and said it (the slap was all uncalled for. All uncalled for," King said. "I then bawled him (Sackman) out for getting me in trouble," King added.

The meeting was one of seven conversations that were recorded by Sackman for the FBI while the informer was wearing elaborate eavesdropping equipment. The tapes were played for the jury on Friday and Monday.

During a two-minute cross examination of King by Assistant U.S. Attorney Eugene Welch, he admitted he was "a so-called friend of Marrone; that he didn't know who the men were who threatened Sackman on Oct. 30, and that he saw no knife in the hands of Mazza on Nov. 18.

John Longeretta, lawyer for Mazza, was the first to sum up for the jury. He was followed by John C. Scholl, lawyer for Zogby, and Joseph Manganelli, attorney for Talerico.

When it was Brindisi's turn, he told the jury it would be difficult for the members not to speculate about why King was in the hospital, why they are in the custody of the marshal and why there has been tight security around the courtroom.

"And you can't speculate why he (Sackman) was an informer," Brindisi said.

Welch was the last to review his case. He said that the jury had heard the truth on the tapes.

United States Department of Justice

UNITED STATES ATTORNEY
NORTHERN DISTRICT OF NEW YORK
FEDERAL BUILDING
SYRACUSE, N. Y. 13201

March 15, 1973

James K. Evans
Chief Deputy Clerk
Federal Building
Utica, New York 13501

Re: Louis Charles King, Jr.

Dear Mr. Evans:

Pursuant to the instructions of the Honorable Lloyd F. MacMahon on March 1, 1973, enclosed herein please find a photocopy of a March 14 letter from Doctor Harry H. Love in regard to Louis Charles King, Jr.'s condition.

The letter is self explanatory, however, the Doctor in his telephone conversation with me on March 14 indicated additional factors that are: although Mr. King is improving daily at least two slugs or bullets remain in his body and, therefore, Mr. King will require surgery at some later date. That surgery, however, will not be performed between now and March 23 the anticipated sentencing date. Also, Mr. King cannot walk on crutches at this time because he has a fractured shoulder as a result of one gun shot wound. Doctor Love was unable to estimate when Mr. King will be able to stand unaided by a wheel chair or crutches.

I trust this information will be sufficient to enable Judge MacMahon to decide whether or not Mr. King would be brought to court for sentencing with his co-defendants.

Very truly yours,

JAMES M. SULLIVAN, JR.
United States Attorney

By: Eugene Welch
Eugene Welch
Assistant U.S. Attorney

U. S. DISTRICT COURT
N. D. OF N. Y.
FILED
MAR 15 1973
AT_____O'CLOCK____M.
J. R. SCULLY, Clerk
UTICA

EW/pd
Enc.

J. BRADFORD MILLET, M. D.
HARRY H. LOVE, M. D., P. C.
1624 GENESEE ST.
UTICA, N. Y., 13502

TELEPHONE 724-6141

March 14, 1973

Mr. Eugene Welch
Assistant U. S. Attorney
Federal Building
Syracuse, New York 13201

Re: Louis King

Dear Mr. Welch:

This is to confirm our telephone conversation this date.

Mr. Louis King is recovering satisfactorily from gun shot wounds and is presently hospitalized at St. Luke's Memorial Hospital Center, Utica, New York. He is gaining strength and March 19, 1973 will be the earliest time he will be able to appear in court without jeopardy to his health.

At that time he will need to be in a wheel chair that has a support for his left foot and I believe he would not tolerate being out of the hospital more than two hours.

Very truly yours,

Harry H. Love, M.D., F.A.C.S.

HHL:tt
cc: Federal Marshall Dulan

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT OF NEW YORK

........................................................

UNITED STATES OF AMERICA
-against-

LOUIS CHARLES KING, JR., ALBERT J. MARRONE, JAMES VINCENT TALERICO, JACK ZOGBY, CARL J. MAZZA, JOHN DOE, described as a white male in his early 30s, with long blond or dirty blonde hair, long blonde sideburns, clean-shaven round face with a ruddy complexion, narrow squinting eyes, and heavy build with a large stomach, approximately 5'9" to 6' tall.

Defendants,

........................................................

# APPELLANT'S BRIEF

for

LOUIS CHARLES KING, JR.

Defendant-Appellant,

........................................................

Criminal No. 72-CR-283
73-CR-9
Docket No. 73-1725-7

To be Argued by:

LOUIS T. BRINDISI, ESQ.
Attorney for Defendant-Appellant,
Louis Charles King, Jr.
Office and P.O. Address
747 Bleecker Street
Utica, New York 13501
Tel. Area Code 315-733-2396

Estimated Time for
Argument - 20 Minutes

# TABLE OF CITATIONS

| | Page |
|---|---|
| Coplan vs. United States, 191, F 2d 749 | 10 |
| Caldwell vs. United States, 205 F. 2d 879 | 10 |
| O'Brien vs. U.S. 386 U.S. 345 | 10 |
| Black vs. U.S., 385 U.S. 26 | 10 |
| U.S. vs. Provoo, 215 F. 2d 531 | 11 |
| Kitchen vs. U.S., 221 F. 2d 832 | 12 |
| Pullman vs. Hall, 55 F. 2d 137 | 12 |
| Carnley vs. U.S., 274 F. 2d. 68 | 12 |
| U.S. vs. DeCarlo , 458 F. 2d, 358 | 14 |
| U.S. vs. Curcio, 310 F. Supp. 351 | 15 |
| Remmer vs. U.S., 347 U.S. 227 (1954) | 17,20,21 |
| Baker vs. Hudspeth, 129 F. 2d. 782 | 17 |
| Griffin vs. U.S., 295 F. 437 (1924) | 18 |
| Mattox vs. U.S., 146 U.S. 140 (1892) | 20 |
| Wheaton vs. U.S., 133 F. 2d. 522 (1943) | 20,22 |
| Remmer vs. U.S., 350 U.S. 377 (1956) | 22 |
| Chambers vs. U.S., 237 F. 513 (1916) | 22 |
| Owen vs. McMann, 435 F. 2d 813 (1970) | 22 |
| Illinois vs. Allen, 397 U.S., 337 (1970) | 23,24,25,26 |
| Lewis vs. U.S., 146 U.S. 370 (1892) | 23,25 |
| Jones vs. U.S., 299 F. 2d 661 (10th Cir. 1962) | 23 |

| | Page |
|---|---|
| *Fina* vs. *U.S.*, 46 F. 2d 643 (10th Cir. 1931) | 23 |
| *Ware* vs. *U.S.*, 376 F. 2d 717 (7th Cir. 1967) | 23 |
| *Johnson* vs. *Zerbst*, 304 U.S. 458, 464 (1938) | 24 |
| *U.S.* vs. *Tortora*, 462 F. 2d. 1202 | 25 |
| *Pointer* vs. *Texas*, 380 U.S. 400 (1965) | 25 |
| *Snyder* vs. *Massachusetts*, 291 U.S. 97,106 | 25 |
| *Diaz* vs. *U.S.*, 223 U.S. 442, 445 (1912) | 25 |

## CONSTITUTION

| | Page |
|---|---|
| Fifth Amendment | 8, 9, 15, 16 |
| Sixth Amendment | 8, 9, 15, 23, 24 |
| Fourteenth Amendment | 9, 25, 26 |

-------

## STATUTES

| | |
|---|---|
| 18 U.S.C. Section 891(6) | 13, 14 |
| 18 U.S.C. Section 894(b) | 13, 14 |

-------

## RULES

| | |
|---|---|
| *Federal Rules of Criminal Procedure*, Rule 43 Advisory Committee Note 2 | 24 |

-------

| | |
|---|---|
| *Federal Jury Practice and Instructions*, Vol. 2 Section 72.09 | 12 |

# INDEX

Page

History of Case.......................................... 1, 2

Statement of Facts.......................................... 3, 4, 5, 6, 7, 8

Statement of Issues Presented for Review:

Point I. The Trial Court Erred in Not Granting Defendant's Motion to Dismiss the Indictment on the Grounds that the Defendant, Marrone, Became an Informer and Revealed the Defense of the Other Co-defendants to Members of the Federal Bureau of Investigation and the United States Attorney's Office.......................... 9, 10

Point II. The Trial Court Erred in Not Allowing Defendant's Counsel to Attack the Credibility of the Witness, J. Schuyler Sackman, by Showing Prior Acts of Misconduct which Directly Related to his Reputation and Character........ 11, 12, 13

Point III. The Trial Court Erred in not Granting Defendant's Motion for Judgment of Acquittal since the Evidence Presented to the Jury was Insufficient as a Matter of Law and by Not Allowing Defendant's Counsel to Cross-examine Sackman as to his State of Mind........................ 13, 14, 15

Point IV. The Court Erred in Not Granting Defendant's Motion to Withdraw a Juror and for a Mistrial Based Upon Possible Prejudice of the Jury Formed as a Result of Events Occurring at the Motel where the Jury was Sequestered......... 15, 16, 17

Point V. The Trial Court Erred in Denying Defendant's Counsel Motion to Voir Dire the Jury and, for a New Trial Based Upon Jury Misconduct After Defense Counsel Advised the Court that he had Received Information that the Jury had Newspapers in its possession, which Newspapers Could have been Highly Prejudicial to the Defendant.............................. 18, 19, 20, 21, 22

**Point VI.** The Trial Court Erred in Not Granting Defendant's Motion for a Mistrial Based upon his Absence from the Trial and its continuance of the Trial and Subsequent Hearings Outside of his presence.............................23, 24, 25, 26

**Point VII.** The Sentence of Twenty Years and $10,000.00 Fine of Defendant-Appellant, Louis Charles King, Jr., is excessive and Inequitable Under all the Facts and Circumstances of this case and in Violation of the Cruel and Inhuman Punishment Clauses of the Eighth Amendment of the Constitution of the United States.........27, 28

**Point VIII.** Counsel for the Defendant, Louis Charles King, Jr., Joins in all the Arguments Briefed by Counsel for the Other Defendants-Appellants Wherever Pertinent and Applicable.......28

**Conclusion.** The Judgment of Conviction should be reversed as to Appellant, Louis Charles King, Jr..................................28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

against

LOUIS CHARLES KING, JR.
ALBERT J. MARRONE
JAMES VINCENT TALERICO
JACK ZOGBY
CARL J. MAZZA
JOHN DOE, described as a white male in his early 30's, with long blonde or dirty blonde hair, long blonde sideburns, clean-shaven round face with a ruddy complexion, narrow squinting eyes, and heavy build with a large stomach, approximately 5'9" tall.

CRIMINAL NO.
73-CR-9

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## HISTORY OF THE CASE

On the 7th day of December, 1972, the above-named defendants were indicted in a seven count indictment by the Grand Jury, Criminal No. 73 CR-9.

The defendant-appellant, Louis Charles King, Jr., was charged with counts I through VII of said indictment.

The case came on for trial on February 20, 1973, in the United States Courthouse in Utica, New York, before the Honorable Lloyd F. McMahon, United States District Judge and a jury. The matter was tried and on the 28th day of February, 1973, the jury returned verdicts of guilty for each of the defendants on each and every count of said indictment. On May 25, 1973, the defendant-appellant, Louis Charles King, Jr., was sentenced.

The defendant, King, was sentenced to twenty years and $10,000.00 fine on each count to run concurrently.

A Notice of Appeal was filed on behalf of defendant-appellant, King, on May 25, 1973, with the United States Court of Appeals, Second Circuit.

## STATEMENT OF FACTS

On the 20th day of February, 1973, this case was called to trial and prior to the selection of the jury a motion was made on behalf of the defendants for a hearing to determine whether or not a co-defendant, Albert Marrone, was an informer and whether or not he had divulged the defense of the remaining defendants to the prosecution. (Transcript, P. 4-8)

A hearing was conducted and it was learned that the defendant, Albert Marrone, did in fact discuss some aspects of the defense with members of the Federal Bureau of Investigation and the Attorney General's Office.(Transcript, P. 9-116) This motion was denied. (Transcript P. 116) The motion was renewed at the end of the trial.(Transcript, P. 1043-1044) The motion was again denied. (Transcript, P. 1047-1050)

Defendant King's Attorney, in his opening statement tried to tell the jury what he expected to prove concerning the reputation and character of the prosecution's chief witness. (Transcript, P. 169-172) The Trial Court interrupted the opening statement and called Defense Counsel to the bench and informed him that this type of proof would be inadmissible. (Transcript, P. 172-173)

The Government's chief witness, J. Schuyler Sackman, testified that he was an insurance agent and mortgage broker. (Transcript, P. 189) That he knew the defendant, Louis Charles King, for approximately two years, (Transcript, P. 191), and that he borrowed $4,000.00 from defendants, King and Marrone (Transcript P. 193) and that King said the loan was for $5,000.00 and that was interest of $1,000.00 on the$4,000.00 loan. (Transcript, P. 195) He testified that he was told if he did not pay the money back he would be in trouble. (Transcript, P. 197) that he took the money back to Syracuse, N. Y., copied the serial numbers on an envelope and gave that envelope to a member of the Federal Bureau of Investigation. (Transcript, P. 197-198) He also testified that at the time he borrowed the money he was an informer for the Federal Bureau of Investigation. (Transcript, P. 259). That he had become an informer in August, 1972 (Transcript, P. 326) and that he had been informing on some of the defendants in this action prior to the loan.

He stated that he borrowed the money because he desperately needed it and he informed the Federal Bureau of Investigation that he was going to borrow the money. (Transcript, P. 332) He used the money to pay his personal bills. (Transcript, P. 340) The federal Bureau of Investigation did not tell him to return the money he borrowed. (Transcript, P. 341) He never told the F. B. I. that he thought violence would be caused to him. (Transcript, P. 342) He met with the F. B. I. daily, (Transcript, P. 343) and he received no threats in earlier conversations. (Transcript, P. 344)

An offer of proof was made in regards to illegal business transactions of J. Schuyler Sackman. (Transcript, P. 352-356) The Court would not allow Defense Counsel to cross-examine on matters which would have affected the character and reputation of Sackman.

Sackman informed the F. B. I. on the day of the alleged crime that he had been shylocked. (Transcript, P. 361) He also told the F. B. I. that he would not have to pay the money back if the deal in Panama went through. (Transcript, P. 364) The Federal Bureau of Investigation knew that there was a deadline and they would not get the money for him. (Transcript, P. 368) He thought that the defendants would be arrested prior to the time that the loan was due. (Transcript, P. 370)

On February 26, 1973, a motion was made for the withdrawal of a juror and a mistrial as a result of an incident occuring on February 24, 1973, involving the defendant, Louis Charles King, Jr. The defendant was shot by members of the Federal

Bureau of Investigation or members of the State Police arising out of a grenade-throwing incident at the home of Louis Kelly, a Special Agent of the Federal Bureau of Investigation. The Court denied this motion and ruled that the defendant King had voluntarily absented himself from the trial and that the trial would continue without his being present. A motion was also made at that time to voir dire the jury to determine whether they knew of the incident since it occurred at the Ramada Inn where they were sequestered. The Court denied the motion on the grounds that he had (The Court) discussed this matter with the Marshals and was assured that the jury did not know of the incident. A further motion was made to continue the trial at the hospital in the defendant King's presence, which was also denied. The Court was also informed that the defendant King wished to testify. The trial continued without any explanation to the jury (Transcript, P. 658-664) regarding the absence of the defendant, King.

Thereafter another motion was made to continue the trial in the presence of the defendant, King, and the Court was informed that there were facilities available at the hospital. (Transcript, P. 743) Another motion was made to voir dire the

A 174

jury after Defense Counsel were informed that all of the jurors activities had been cancelled on the day of the incident and that newspapers had been received by the jury, which newspapers were confiscated by the Marshalls. These motions were again denied. (Transcript, P. 744-745)

At the hospital and before the defendant King testified, the doctor indicated that King was rational and had been rational since the morning of his injury (transcript, P. 826) and that he was quite anxious to testify. (Transcript, P. 828)

King testified and the Court instructed the jury "Suffice it to say over the weekend he was injured." (Transcript, P. 859)

The Court was requested after the defendant King testified to continue the trial at the hospital, which requ st was denied. (Transcript, P. 860)

After the trial was completed and the defendant found guilty a motion for judgment of acquital and for a new trial was made. These motions were denied. A hearing was ordered by the Court to determine the voluntariness of the defendant King's absence from the trial, and a request was made that a hearing be held in the presence of the defendant, King. This was denied. Defendant's counsel then withdrew his motion for a hearing and this was also denied by the Court. (Transcript, P. 1043-1072) Counsel for defendant, King, did not participate in the hearing. (Transcript, P. 1073) The Court, after the hearing, ruled that the defendant had knowingly and voluntarily absented himself from the trial. (Transcript, P. 1074-1087)

The defendant was sentenced on May 25, 1973 to twenty years and fines of $10,000.00 on each count, to run concurrently with each other. (Transcript, P. 1112)

## CONSTITUTIONAL AMENDMENTS INVOLVED

The Fifth Amendment of the Constitution of the United States states as follows: "No person shall be held to answer for a capital, or otherwise infamous crime...nor be deprived of life, liberty, or property, without due process of law:.."

The Sixth Amendment of the Constitution of the United States states as follows: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The Fourteenth Amendment of the Constitution of the United States states as follows: "...nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws..."

## ARGUMENT

### POINT 1

### THE TRIAL COURT ERRED IN NOT GRANTING DEFENDANT'S MOTION TO DISMISS THE INDICTMENT ON THE GROUNDS THAT THE DEFENDANT, MARRONE, BECAME AN INFORMER AND REVEALED THE DEFENSE OF THE OTHER CO-DEFENDANTS TO MEMBERS OF THE FEDERAL BUREAU OF INVESTIGATION AND THE UNITED STATES ATTORNEY'S OFFICE.

There are indications in the record that one of the co-defendants, Albert Marrone, had turned informer and was cooperating with the United States Attorney's office. This is a violation of the defendant's Constitutional right to effective assistance of counsel under the Fifth and Sixth Amendments and invalidates the trial and requires a verdict of guilty to be set aside, regardless of whether prejudice was shown to have resulted from the violation of his rights (*Coplan* vs. *U.S.*, 191F. 2d 749; *Caldwell* vs. *United States,* 205F 2d 879; *O'Brien* vs. *U.S.*, 286 U.S. 45; *Black* vs. *U.S.*, 385 U.S. 26).

The Court in *Caldwell* has assumed that the mere fact of the intrusion, without more, tainted the conviction, when it makes such misconduct prejudicial per se.

In *Black,* the prosecuting attorneys unwittingly referred to notes which contained information regarding monitored conversations.

In *O'Brien,* the overheard conversations were neither included in the F.B.I. reports nor related to the Department of Justice. In both cases, the danger imposed by such intrusions was considered to be real enough to require reversal and a new trial.

## POINT 11

### THE TRIAL COURT ERRED IN NOT ALLOWING DEFENDANT'S COUNSEL TO ATTACK THE CREDIBILITY OF THE WITNESS, J. SCHUYLER SACKMAN, BY SHOWING PRIOR ACTS OF MISCONDUCT WHICH DIRECTLY RELATED TO HIS REPUTATION AND CHARACTER.

Starting with the opening statement of counsel, the Trial Court had advised that he would not allow defense counsel to examine the witness, Sackman, concerning any previous acts of misconduct. The Court indicated that the witness could only be impeached by prior convictions and that defense counsel could not attack the credibility of the witness by showing prior acts of misconduct which related to the reputation and character of the Government's chief witness.

The Court stated that it relied upon U.S. vs. Provoo 215 F 2d 531. The Court in Provoostated that "Defendant taking the witness stand subjects himself to cross-examination; within limits of appropriate rules of evidence, like any other witness, for the purpose of impeaching his credibility, specific acts of misconduct by him, not resulting in his conviction of a felony or crime of moral turpitude, are not proper subjects of cross-examination for such purposes." While this case is correct, it does not apply to the instant case because

Sackman was not a defendant but rather a mere witness and his credibility could have been impeached by attacking his reputation for veracity. The reason for the Provocase is to prevent prejudice to defendant, but that reason is inapplicable to impeaching a witness.

In Kitchen vs. U.S., 221F 2d 832, it was stated, "Questions upon collateral issues for impeachment purposes on cross-examination are permissible when the subject matter of the question bears directly upon the veracity of the witness in respect to the issue involved."

In Pullman Co. vs. Hall, 55F 2d 139, it was held that for purposes of impeaching credibility, witnesses may be questioned as to misconduct respecting collateral matters, which have a tendency to show lack of honesty or truthfulness.

Proof of a witness' reputation for truth and voracity is admitted where there is a question whether a witness had testified truthfully (Carnley vs. U.S., 274F 2d 68).

See also Federal Jury Practice and Instructions, Vol. 2, by Devitt-Blackmar, Section 72.09, at page 151, entitled Effect of Prior Inconsistent Statements or Conduct-By a Witness Not a Party-By a Party, as follows: "Evidence that at some other time, a witness,not a party to this action, has said or done something which is inconsistent with the witness' testimony at the trial, may be considered for the sole purpose of judging credibility of the witness; but may never be considered as evidence or proof of the truth of any such statement.

## POINT 111

## THE TRIAL COURT ERRED IN NOT GRANTING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL SINCE THE EVIDENCE PRESENTED TO THE JURY WAS INSUFFICIENT AS A MATTER OF LAW AND BY NOT ALLOWING DEFENDANT'S COUNSEL TO CROSS-EXAMINE SACKMAN AS TO HIS STATE OF MIND.

The victim's state of mind is relevant both at the time the loan was made and at the time for collection. 18 U.S.C., Section 891(6) defines an extortionate extention of credit as "Any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making the payment..."could result in the use of violance..."

18 U.S.C., Section 894(b) states that, "In any prosecution under this section... evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the

implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means...".

In the case of U.S. vs. DeCarlo, 458 F. 2d 358, the defendants were convicted of violating both Sections 892 and 894 of 18 U.S.C. The Court there stated that the victim's state of mind even subsequent to the initial threat of harm is relevant in determining whether the victim was in a state of fear regarding collection of the debt. The Court also said, by way of footnote: "It appears that the state of mind of the victim is not only relevant to the crimes charged in the indictment, but an essential element to be proved by the Government." 18 U.S.C., Section 891 (6).

The DeCarlo case went on to say that heresay testimony to show the victim's mental apprehension regarding collection of a debt is relevant and admissible.

At the instant trial there was a motion to introduce acts of misconduct to affect Sackman's credibility, which was denied. As a result of the DeCarlo case, it would seem that such evidence is admissible to show the victim's state of mind and even statements made by the victim to others are admissible as an exception to the heresay rule. It also appears that the mere fact that Sackman was cooperating and working with the Federal Bureau of Investigation is sufficient to negate the requirement that the victim be in fear of physical punishment. In any event, it seems to be a gross error not to allow interrogation into Sackman's prior activities to show his state of mind.

The Court in U.S. vs. Curcio, 310 F Supp. 351, stated that evidence of defendant's reputation and past conduct to show that defendant's acts or statements under all the circumstances, constituted an implicit threat. Introduction of such evidence was held not to violate defendant's Fifth and Sixth Amendment rights. Since a witness would not even be involved with lack of confrontation or due process since he is not being prosecuted, there should be no objection, and it should be extremely necessary and proper, to introduce evidence of the victim's reputation and past conduct to show that defendant's acts or statements under all the circumstances did not constitute an implicit threat.

## POINT IV

### THE COURT ERRED IN NOT GRANTING DEFENDANT'S MOTION TO WITHDRAW A JUROR AND FOR A MISTRIAL BASED UPON POSSIBLE PREJUDICE OF THE JURY FORMED AS A RESULT OF EVENTS OCCURRING AT THE MOTEL WHERE THE JURY WAS SEQUESTERED.

On the night of February 24, 1973, while the jury was sequestered at the Ramada Inn Motel, pursuant to the Order of the Trial Court, the defendant, Louis Charles King, Jr., allegedly attempted to assault an F.B.I. agent by throwing a grenade into the agent's house. A chase followed which concluded with a shoot-out in the parking lot at the Ramada Inn Motel where the jury was sequestered.

It is difficult to believe that such an event would go unnoticed by the occupants of this motel and would not be discussed among them. It is further difficult to believe that such an event would not in some way come to the attention of the jury so as to influence their impartiality towards the defendant, King. This would especially be true in view of the fact that upon the continuation of the trial the following Monday, the defendant, Louis Charles King, Jr., was absent from his seat next to his attorney. Not only was the defendant absent, but when Court reconvened, the hallway leading to the jury room and court room was filled with United States Marshals and electronic detecting devices, which were manned by armed guards. The appearance of these devices and armed guards, without any explanation by the Court had a detrimental and prejudicial effect on the defendant.

It is submitted that in view of the possibility that prejudice could have resulted in the jury's minds as a result of the foregoing incident, that the Court had the duty upon a motion such as was made by defendant's counsel, to investigate and determine whether or not the incident complained of was harmful to the defendants. See Remmer vs. U.S., 347 U.S. 227 (1954).

No such investigation or determination was conducted by the Trial Court.

In the case of Baker vs. Hudspeth, 129 F. 2d 782, it was stated that "Where it is made to appear that a jury sworn to try a case is subjected or exposed to any matter or thing that might tend to prejudice or influence their consideration of the case or that the behavior of any member of the jury is unbecoming to a gentleman of the jury, a presumption arises against impartiality and that presumption can be rebutted only by a clear and positive showing that such matter did not influence the verdict."

It is submitted that a presumption of impartiality clearly arose as a result of the incident which occurred at the Ramada Inn, which presumption was never rebutted.

## POINT V

### THE TRIAL COURT ERRED IN DENYING DEFENDANT'S COUNSEL MOTION TO VOIR DIRE THE JURY AND, FOR A NEW TRIAL BASED UPON JURY MISCONDUCT AFTER DEFENSE COUNSEL ADVISED THE COURT THAT HE HAD RECEIVED INFORMATION THAT THE JURY HAD NEWSPAPERS IN ITS POSSESSION, WHICH NEWSPAPERS COULD HAVE BEEN HIGHLY PREJUDICIAL TO THE DEFENDANT.

The defendant's attorney made a motion to voir dire the jury (transcript, p. 743). As was indicated at the time the motion was made, counsel for defendant, King, was advised by counsel for co-defendant, Marrone, that the jury had newspapers in its possession, which newspapers had to be confiscated by the United States Marshal's office. Defendant King's counsel was advised by the attorney for Marrone, that he had been so informed by members of the United States Marshall's office. This was related to the Court.

In a similar case entitled Griffen vs. U.S., 295 F. 437, the Circuit Court of Appeals, decided on February 7, 1924, members of the jury were seen reading newspapers in which was published an article very prejudicial to the defendant. Defendant's counsel made a motion for a new trial based upon the misconduct of the jury in reading these articles, but the motions were denied. Judgment was reversed and a new trial ordered. The Court reasoned "It is the right of a defendant accused of a crime to have nothing reach the mind of the jury during the case except strictly legal evidence admitted according to law and if facts prejudicial to him reach the jury otherwise, it is the duty of the trial Judge to withdraw a juror and grant a new trial.".

In the instant case, defense counsel sought to have the Court investigate the fact that the jury had in its possession copies of the local newspapers which contained flagrantly prejudicial articles concerning the defendant, together with unmistakable headlines concerning certain events, which, if known to the jury would have been severely prejudicial. Defendant's counsel not only made a motion for a mistrial, but also a motion to voir dire the jury and a motion for a new trial. The trial Judge not only denied the defendant's counsel's motion but also stated he would make no efforts to investigate the matters in open court nor would he consider this point in the future. He indicated that he was assured by the Marshals that nothing prejudicial had come into the hands of the jury.

It is submitted that the Court should have required at the very minimum, a hearing in which to determine whether any prejudice existed in the minds of the jury with respect to the defendant as a result of reading any newspapers containing prejudicial statements or articles. The Court did not and it is submitted that this is prejudicial error.

The Court's attention is further directed to the case of *Remmer* vs. *U.S.*, 347 U.S. 227 (1954). In this case, it was brought to the Court's attention that the jury was the recipient of certain unwarranted communications. The F.B.I. was requested to investigate which they did, after which the prosecuting attorney, and the trial court Judge considered their findings. A motion was made by the defense for a new trial which was denied. The judgment was vacated and the case remanded for a hearing to determine whether the incident complained of was harmful to the petitioners. The Court citing *Mattox* vs. *U.S.*, 146 U.S. 140 and *Wheaton* vs. *U.S.*, 133 F. 2d 522, stated that in a criminal case, any private communication, contact or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the Court and the instructions and directions of the Court made during the trial, with full knowledge of the parties. The presumption is not conclusive but the burden rests heavily upon the Government to establish after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

In the instant case, the defendant's counsel brought to the Court's attention that jury misconduct had occurred. The Trial Court thereupon sought the assistance of the United States Marshal and without any notice to or hearing of the defendant summarily and with no hearing in the matter, denied defendant counsel's motion for a mistrial, together with a denial of the motion to voir dire the jury and for a new trial.

The Court in Remmer goes on to say, "The Trial Court should not decide to take final action ex parte on information such as was received in this case but should determine the circumstances, the impact thereof upon the juror and whether or not it was prejudicial in a hearing with all interested parties permitted to participate".

Defense, in the instant case was granted no such opportunity.

It should also be pointed out that upon remand of the above-cited case a hearing was conducted at the end of which the District Court ordered that no harmful prejudice had resulted from the jury contact complained of. Upon appeal of that ruling, the Supreme Court in 350 U.S., 377, reversed upon the record and ordered a new trial.

The Court stated that the District Court did not go far enough into an investigation of possible prejudice from the jury conduct complained of, but that there was enough to see that there was indeed prejudice existing. The Court stated as its holding, "We hold that on a consideration of all the evidence uninfluenced by the District Court's narrow construction of the incident complained of, the petitioner is entitled to a new trial.".

Other cases in support of the foregoing are as follows: Chambers vs. U.S., 237 F.513; Wheaton vs. U.S., 133 F. 2d. 522; Owen vs. McMann, 435 F. 2d 813 (1970)

## POINT VI

## THE TRIAL COURT ERRED IN NOT GRANTING DEFENDANT'S MOTION FOR A MISTRIAL BASED UPON HIS ABSENCE FROM THE TRIAL AND ITS CONTINUATION OF THE TRIAL AND SUBSEQUENT HEARINGS OUTSIDE OF HIS PRESENCE.

One of the most basic of the rights guaranteed by the Confrontation Clause of the Sixth Amendment is the accused's right to be present at every stage of the trial. Illinois vs. Allen, 397 U.S. 337, 90S Ct. 57, 25 L Ed. 2d 353 (1970); Lewis vs. U.S., 146 U.S. 70, 13 S. Ct. 136, 36L. Ed. 1011 (1892).

Since the absence of a criminal defendant during the course of proceedings which are critical to the trial process carries Constitutional overtones, appellant is under no burden to show actual prejudice for it will be presumed. Jones vs. U.S., 299 F. 2d 661 (10th Cir. 1962); Fina vs. U.S., 46F. 2d 643 (10th Cir. 1931). However, as was stated in Jones vs. U.S., Supra, "We can let stand no conviction where the defendant was not present at all stages of the proceedings unless the record completely negatives any reasonable possibility of prejudice arising from such error." See also Ware vs. U.S., 376F. 2d 717 (7th Cir. 1967).

The defendant-appellant should have been present during in camera proceedings regarding his voluntary absence from the trial.

The Constitution does not require the Court to discontinue a trial once commenced if the defendant has voluntarily absented himself. Federal Rules of Criminal Procedure, Rule 43 and Advisory Committee Note 2; see Illinois vs. Allen, 397 U.S. 337, 90 S. Ct. 1057, 1060.

Although we cannot presume the waiver of constitutional rights, Johnson vs. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938).

The Trial Court should have at least conducted a full hearing in the presence of the defendant to determine whether or not his absence from the trial was voluntary. Defense Counsel wanted defendant present so that he could be assisted by the defendant during the hearing and to present any evidence that the defendant would have to offer concerning his voluntary absence during the course of the trial.

The Confrontation Clause of the Sixth Amendment to the Constitution provides that: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him..." The Supreme Court has held that the Fourteenth Amendment makes the guarantees of this clause obligatory upon the states. Pointer vs. Texas, 380 U.S. 400 (1965). One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the court room at every stage of his trial. Lewis vs. U.S., 146 U.S. 370 (1892).

In the U.S. vs. Tortora, 464 F. 2d 1202 (1972), it was stated,"Like any Constitutional guarantee, the defendant's right to be present at trial may be waived." Snyder vs. Massachusetts, 291 U.S. 97, 106, even if that waiver is implied from the defendant's conduct, Illinois vs. Allen, Supra. The Supreme Court long held that a defendant who knowingly absents himself from the court room during trial "leaves the Court free to proceed with trial in like manner and with like effect as if he were present." Diaz vs. U.S., 223 U.S. 442, 445 (1912)... waiver of a Constitution right must be "knowingly" and "voluntary"...

Having received actual notice when trial proceedings will take place, in the absence of some compelling excuse, the defendant cannot obstruct the course of justice by absenting himself from the process, cf. Illinois vs. Allen, Supra.

In the instant case the defendant was shot by members of the Federal Bureau of Investigation or the State Police. He was in a hospital in the same area in which the trial was being conducted and the trial could have proceeded in his presence at the hospital. He was rational and facilities were provided to take his testimony at the hospital, which facilities were large enough to accommodate the judge, jury, defendants and their attorneys, prosecuting attorneys, press and thirty or more spectators.

The defendant was not present at the hearing to determine voluntariness and he could not give his side of the story. He could not participate with his attorney in his defense as was stated in Court (Transcript, P. 1069) "Mr. Brindisi; I don't have his assistance to participate in the conduct of his hearing."

The Court: "You can tell him about what occurred. We will proceed."

The rights of the defendant under the due process clauses of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment have also been violated by the Court's conduct in continuing the trial in the absence of the defendant.

## POINT VII

## THE SENTENCE OF TWENTY (20) YEARS AND $10,000.00 FINE, OF DEFENDANT-APPELLANT, LOUIS CHARLES KING, JR., IS EXCESSIVE AND INEQUITABLE UNDER ALL THE FACTS AND CIRCUMSTANCES OF THIS CASE AND IN VIOLATION OF THE CRUEL AND INHUMAN PUNISHMENT CLAUSES OF THE EIGHTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

In view of the circumstances contained in the instant case, the sentencing of twenty years and $10,000.00 fine on each count which sentence is to run concurrently, is excessive.

The co-defendant, Albert Marrone, was convicted and was sentenced to seven years imprisonment. The co-defendant, James Talerico, was convicted and sentenced to seven years imprisonment. The co-defendants, Zogby and Mazza, were convicted and sentenced to ten years in prison. As was brought out in the trial, the actual acts of violence, if any, were committed by the co-defendants, Mazza and Zogby. The initial loan, if Sackman is to be believed, was made by the co-defendant, Marrone.

All of the testimony of Sackman tends to show that he, at no time, was in fear that violence would be caused to him by the defendant, Louis Charles King, Jr.

The sentence given by the Court to the defendant, Louis Charles King, Jr., can only be interpreted as additional punishment for acts which he was accused of committing as a result of the hand grenade throwing incident at the house of special agent of the Federal Bureau of Investigation, Louis Kelly.

## POINT VIII

## COUNSEL FOR THE DEFENDANT, LOUIS CHARLES KING, JR., JOINS IN ALL THE ARGUMENTS BRIEFED BY COUNSEL FOR THE OTHER DEFENDANTS-APPELLANTS WHEREVER PERTINENT AND APPLICABLE.

## CONCLUSION

The judgment of conviction should be reversed as to appellant, Louis Charles King, Jr.

Respectfully submitted,

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## TABLE OF CONTENTS

Page

Table of Authorities .......... ii

Statement of Issues .......... 1

Statement of the Case .......... 2

ARGUMENT:

POINT I — The denial of the motion for a mistrial following the weekend incident was a proper exercise of the trial court's discretion under all the circumstances .. 4

POINT II — The trial court's refusal to *voir dire* the jury was not error in the circumstances of this case .......... 12

POINT III —It was not error for the court to proceed in King's absence under all the circumstances .......... 16

POINT IV — The trial court's denial of the pre-trial motion to dismiss the indictment based upon allegations concerning the defendant Marrone was proper .......... 25

POINT V — The trial court was correct in ruling that the character of the witness, J. Schuyler Sackman, could not be impeached by showing prior acts of misconduct not resulting in conviction .......... 34

POINT VI — The motion for severance was properly denied .......... 36

POINT VII — The evidence and jury charge were sufficient as a matter of law .......... 38

POINT VIII — The sentences of King and Mazza are appropriate and should stand .......... 50

Conclusion .......... 52

A 197

Page

## TABLE OF AUTHORITIES CITED

Cases:

*Berger* v. *Ur[illegible] States*, 295 U.S. 78, 55 S.Ct. 629 (1935) 47, 48

*Black* v. *United States*, 385 U.S. 26, 87 S.Ct. 190 (1966) .... 31

*Bruton* v. *United States*, 391 U.S. 123, 88 S.Ct. 1620 (1968) . 37

*Caldwell* v. *United States*, 205 F.2d 879 (D.C. Cir. 1953), *cert. denied*, 349 U.S. 930 (1955); 218 F.2d 370 (D.C. Cir. 1954) .................................. 31, 32

*Coplon* v. *United States*, 191 F.2d 749 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 926 (1952) .................... 31, 32

*Cotton* v. *United States*, 409 F.2d 1049 (10th Cir. 1969), *cert. denied*, 396 U.S. 1016 (1970) .................... 45, 46

*Diaz* v. *United States*, 223 U.S. 442, 32 S.Ct. 250 (1912) .... 18

*Dorman* v. *United States*, 435 F.2d 385 (D.C. Cir. 1970) ... 8

*Illinois* v. *Allen*, 397 U.S. 337, 90 S.Ct. 1057 (1970) .... 18, 19

*Marshall* v. *United States*, 360 U.S. 310, 79 S.Ct. 1171 (1959) ........................................ 4

*O'Brien* v. *United States*, 386 U.S. 345, 87 S.Ct. 1158 (1967) 31

*Pettibone* v. *United States*, 148 U.S. 197, 13 S.Ct. 542 (1893) ...................................... 45, 46

*Synder* v. *Massachusetts*, 291 U.S. 97, 54 S.Ct. 330 (1934) .. 18

*South Dakota* v. *Long*, 465 F.2d 65 (8th Cir. 1972) *cert. denied*, ______ U.S. ______ (1973) .............. 32

*United States* v. *Adams*, 434 F.2d 756 (2d Cir. 1973) ...... 36

*United States* v. *Aviles*, 274 F.2d 179 (2d Cir. 1960), *cert. denied*, 362 U.S. 974 (1960) ..................... 10, 11

Page

*United States* v. *Bentvena*, 319 F.2d 916 (2d Cir. 1963), *cert. denied, sub nom., Ormento* v. *United States*, 375 U.S. 940 (1963) . . . . . . . . . . 10, 11, 19, 20, 21, 22, 37

*United States* v. *Borelli*, 435 F.2d 500 (2d Cir. 1970) *Cert. denied*, 401 U.S. 946 (1971) . . . . . . . . . . 14, 36

*United States* v. *Bowe*, 360 F.2d 1 (2d Cir. 1966), *cert. denied*, 385 U.S. 961, 87 S.Ct. 401 (1966) . . . . . . . . . . 34, 35

*United States* v. *Briola*, 465 F.2d 1018 (10th Cir. 1972), *cert. denied*, ______ U.S. ______, *rehearing denied*, ______ U.S. ______ . . . . . . . . . . 42, 48, 49

*United States* v. *Brown*, 479 F.2d 1170 (2d Cir. 1973) . . . . . . 51

*United States* v. *Calabro*, 467 F.2d 973 (2d Cir. 1972), *cert. denied*, 410 U.S. 926 (1973) . . . . . . . . . . 36

*United States ex rel. Cooper* v. *Denno*, 221 F.2d 626 (2d Cir. 1955), *cert. denied*, 349 U.S. 968 (1958) . . . . . . . . . . 32

*United States* v. *D'Avanzo*, 443 F.2d 1224 (2d Cir.), *cert. denied*, 404 U.S. 850 (1971) . . . . . . . . . . 38

*United States* v. *DeSapio*, 435 F.2d 272, (2d Cir. 1970) . . . . . 36

*United States* v. *Glasser*, 443 F.2d 994 (2d Cir. 1971) . . . . . . 35

*United States* v. *Haupt*, 136 F.2d 661 (7th CIr. 1943) . . . . . . 37

*United States* v. *Kahn*, 366 F.2d 259 (2d Cir. 1966) . . . . . . . . 37

*United States* v. *Littman*, 421 F.2d 981 (2d Cir. 1970) . . . . . 37

*United States* v. *Marshall*, 458 F.2d 446 (2d Cir. 1972) . . . . . . . . . . 4, 6, 10, 11

*United States* v. *McCord*, 466 F.2d 17 (2d Cir. 1972) . . . . . . 51

*United States* v. *Mosca*, 475 F.2d 1052 (2d Cir. 1973) . . . . . 33

*United States* v. *Peden*, 472 F.2d 583 (2d Cir. 1973) . . . . . . . 36

*United States* v. *Provoo*, 215 F.2d 531 (2d Cir. 1954) . . . . . . 35

Page

*United States* v. *Quintana*, 457 F.2d 874 (10th Cir. 1972) ... 42

*United States* v. *Rybicki*, 403 F.2d 599 (6th Cir. 1968) .. 45, 46

*United States* v. *Sclafani*, F.2d (2d Cir., June 27, 1973, Docket Nos. 73-1017, 1048) .................. 38

*United States* v. *Sposato*, 446 F.2d 779 (2d Cir. 1971) ...... 35

*United States* v. *Tortora*, 464 F.2d 1202 (2d Cir. 1972), *cert. denied, sub nom. Santoro* v. *United States*, 409 U.S. 1063 (1972) .................................. 16, 17, 18, 19

*United States* v. *Tucker*, 404 U.S. 443 (1972) .......... 50, 51

*United States* v. *Vega*, 458 F.2d 1234 (2d Cir. 1970) ....... 37

*United States* v. *Velazquez*, 482 F.2d 139 (2d Cir. 1973) .... 50

*United States* v. *Zito*, 460 F.2d 1401 (2d Cir. 1972) ........ 42

*United States* v. *Zarzour*, 432 F.2d 1, 3-5, (5th Cir. 1970) 33, 34

**Statutes:**

18 U.S.C. §892 (1968) ................................ 16

18 U.S.C. §893 (1968) ................................ 16

18 U.S.C. §894 (1968) ................................ 16

**Other Authority:**

McCormick, *Evidence* (1954) ........................ 35

2 *Wigmore on Evidence* (1940 rev. ed.) .................. 35

IN THE

# United States Court of Appeals

## For the Second Circuit

UNITED STATES OF AMERICA,

*Appellee,*

—*vs.*—

LOUIS CHARLES KING, JR.,
JAMES VINCENT TALERICO,
JACK ZOGBY,
CARL J. MAZZA,

*Appellants.*

On appeal from the United States District Court,
Northern District of New York

## BRIEF FOR APPELLEE, UNITED STATES OF AMERICA

### STATEMENT OF ISSUES

I. Did the trial court err in refusing to declare a mistrial after the weekend incident?

II. Did the trial court err in exercising its discretion by not conducting a *voir dire* of the jury after the weekend incident?

III. Did the trial court err in proceeding in King's absence?

IV. Did the trial court err in denying the motions to dismiss the Indictment as a result of allegations about the severed co-defendant Marrone?

V. Did the trial court err in its application of the Second Circuit rule that prior acts of misconduct not resulting in a felony conviction are not available for impeachment material?

VI. Did the court below err in denying the defendant Zogby's motion for severance?

VII. Was the evidence sufficient to sustain the convictions below?

VIII. Were the sentences of King and Mazza excessive or inappropriate?

## STATEMENT OF THE CASE

The appellee, United States of America, submits that as to the discussion of the evidence, the discussion in the arguments below should be sufficient except that it is requested that the court consider all of the evidence set forth in the government's appendix.

As to the history of the case, the government agrees generally with the history set forth in the appellant's briefs with the exception of the following additional factors which were either in error in the other briefs or omitted from the other briefs. Specifically, it should be noted that the jury's verdict was returned on March 1, 1973, at approximately 12:15 P.M., after having received the case for deliberation on February 28, 1973, at approximately 11:45 A.M. The jury had deliberated from 11:45 A.M. on the 28th of February, to and including 10:30 P.M. that day, resuming its deliberations at approximately 10:00 A.M. the following morning. Further discussion of the jury's deliberation is set forth in argument below.

It should be noted, the defendant Marrone who was severed on his own motion, as a result of the government's lack of objection to that severance motion, was ultimately tried and convicted before another United States District Court Judge upon similar evidence but without the events that marked the instant case. The defendant Marrone was sentenced to seven years in prison by that United States District Court Judge who indicated he did so because the number of contacts by Marrone with the victim Sackman were minimal and he appeared to be a fringe player in this scheme where the defendant King attempted to place the blame on the defendant Marrone.

In May of 1973, the defendant Delwright Dyman was arrested on a "John Doe" warrant based upon the John Doe Indictment. He was picked out of a lineup and in September of 1973 was convicted on two counts for his role in the October 30th, threatening of the victim Sackman. The defendant Dyman whose role was similar to that of the defendant Mazza and the defendant Zogby, received a similar sentence, that is, ten years in prison. The defendant Dyman's trial was, likewise, without the events that marked the King trial. It is clear, therefore, that the evidence was strong enough to have sustained the conviction of the co-defendants since two other trial juries considering similar evidence convicted two other defendants in absolutely uneventful trials. As indicated above, further statement of the history of the case or of the evidence would only serve to needlessly lengthen the government's brief. It is requested, however, that the Court of Appeals avail itself of the government's appendix which includes what the government feels are pertinent matters of record.

## POINT I

## THE DENIAL OF THE MOTION FOR A MISTRIAL FOLLOWING THE WEEKEND INCIDENT WAS A PROPER EXERCISE OF THE TRIAL COURT'S DISCRETION UNDER ALL THE CIRCUMSTANCES.

It is contended by all the defendants in their briefs that it was error for the trial court to have denied their respective motions for a mistrial following the weekend incident in which the defendant King was shot during the act of throwing a hand grenade into the home of the senior resident agent of the FBI in Utica, New York. It is clear, beyond a shadow of a doubt, that a trial judge has a great deal of discretion in ruling on an issue of prejudice to the jury, with each case turning on its own peculiar facts. Marshall v. United States, 360 U.S. 310, 79 S.Ct., 1171 (1959), United States v. Marshall, 458 F.2d, 446 (2d Cir., 1972). It is equally clear from the facts of this particular case, as indicated in the trial court's opinion below, that a mistrial was not called for as a result of the deliberate criminal act on the part of the defendant King.

As to the defendant King, it is the government's position that he should not avail himself of any arguments relating to the weekend incident which was clearly his own voluntary criminal act (pp. 1069-1087). The exact reason why the defendant King committed the heinous crime during the weekend recess of his trial remains to be litigated in a subsequent trial. The trial court below did take adequate steps to determine that it was a voluntary act, the consequences of which he should bear. Therefore, it is the position of the government that this court should refuse to consider any and all arguments by the defendant King in relation to his deliberate act which could have disrupted his trial below if it had not been for the care exercised by the trial court.

As to the codefendants, they have failed to make any showing that a mistrial was required in the circumstances. Their arguments for a mistrial can be broken down into two groups. First, the jury had to know about the weekend incident which would prejudice the jury against them. Second, the atmosphere of the trial as the result of that incident had to prejudice the jury against them.

Jury's Knowledge of the Incident - It is clear from all of the circumstances in the record below that the jury had absolutely no knowledge of the weekend incident nor is there any reason to believe that they did. From the very beginning of this trial there were allegations that the defendants would attempt to reach the jury and that there would be a great deal of attendant publicity concerning this trial. The trial judge ordered this jury sequestered to avoid the possibility of any prejudice from adverse publicity. After so ruling, the trial judge noted that in view of the evidence in the sealed pre-trial hearing, the wisdom of sequestering the jury became even more apparent. The jurors were sequestered and insulated from all outside influences. The trial court took immediate steps to satisfy itself that the jurors had not heard of the weekend incident, and satisfied itself by conferring with the juror's custodians, the United States Marshals. As the trial court noted in the circumstances of the jury's sequestration, there was no way possible for any information concerning the weekend incident to have reached the jury.

It should be noted that from the newspaper accounts before the judge, while he was considering these motions for mistrial, it was clear that the shooting that may have occurred at the Ramada Inn, occurred in the parking lot of the restaurant, which is located on the opposite end of the building from the motel rooms. Not only would it be unlikely that the jurors would have heard the actual incident but the United States Marshals assured the trial court that they did not.

At each recess of any duration the court clearly admonished the jury not to listen to or read any accounts related to this trial, nor to discuss the case or let anyone else talk with them about it. It cannot be said that these instructions were not heeded by the jury. United States v. Marshall, 458 F.2d 446, 452 (2d Cir., 1972). There is simply no way that the jury could have learned of the incident; and any assertions that they had can be nothing more than mere speculation in view of the safeguards taken by the trial court to insulate them from precisely that kind of outside influence.

The remark by King's attorney that he had heard from the attorney for the codefendant Marrone that the Marshal had given the jury newpapers should be viewed with suspicion. The defendants, one week earlier, had alleged that Marrone and his attorney were cooperating with the government and spying on the defense. In addition, it is ludicrous to imagine that a Marshal on a sequestered jury would give the jury a newspaper account of the kind of thing from which he was to keep them insulated. And finally that comment is directly contrary to what was said to the trial judge by the same source.

That the jury did not hear of the incident or consider it to the prejudice of the defendants can be seen from the care with which they deliberated their verdict. The jury received the case following the court's instructions at 11:45 A.M. on Wednesday, February 28, 1973. At one point they requested to hear again the Court's charge on Count I. They deliberated until 5:50 P.M. when they requested to hear the tape recordings again. With the consent of the defendants and the government the jury read the various transcripts during the course of the evening and continued to deliberate until 10:30 P.M. that evening. The jury continued its deliberation on Thursday morning, with the request that it hear the tape recording of the defendant King and the victim Sackman from November 11, 1972 which conversation constituted the basis for Count III in which King was charged alone.

That tape was concluded at 12:00 noon and the jury retired. Only minutes later they returned their verdict, as if they just wanted to refresh their recollection as to that particular count as to King before deciding on that, the last remaining count to be decided. At 12:15 P.M. on Thursday, March 1, 1973, the jury returned its verdict. To have taken so long when the evidence was so overwhelming (p. 1083) could only mean they were deliberating properly, considering the evidence as to each, count by count, defendant by defendant for all four defendants on all seven counts. The length and care of the jury's deliberation are indicative of the care with which the jury considered the evidence against each of these defendants, reinforcing what was clear to the trial court, that the jury had in fact no idea as to what happened over the weekend.

The Atmosphere of the Trial - As a further basis for their motions for mistrial and as argument that the court's denial of the motions for mistrial was in error the defendants cite the atmosphere of the trial as a result of the weekend incident. Again, the atmosphere of the trial is appropriately left in the hands of the trial judge who is there, in a position to determine what in reality it is. The defendants' counsel, of course, are advocates as are government counsel. The trial judge in his discretion has an opportunity to evaluate the atmosphere of the trial to determine if in fact it is prejudicial to the defendants. It is submitted that the atmosphere in this trial was not so radically changed after the weekend incident as to cause prejudice to these defendants. The atmosphere remained much the same as it had during the first week of trial.

It should be noted that just prior to the open court sessions where counsel made their opening remarks to the jury, defense counsel for the defendant King made a motion for a non-public trial alleging that his life had been threatened (p. 151). Subsequently the court ruled that the spectators could be carefully watched and controlled and that there would be no need for a non-public trial (p. 228). As a result of this defense request, however, there were during the first week of proceedings prior to the weekend incident, Deputy United States Marshals stationed strategically throughout the courtroom for the express purpose of watching and controlling the spectators at the request of defense counsel. In addition, personal searches were conducted by armed uniformed building security guards who were stationed in the hallway outside the courtroom in full view of the jury as it came and went from the court house, a precaution well within the trial judge's discretion particularly in view of the allegations in the sealed pre-trial hearing and the allegations by defense counsel. It is clear therefore that this atmosphere was created as a direct result of the defendant's own activities.

On the Monday following the weekend incident, the United States Post Office and Court House Uniformed Security Guards were increased by two Uniformed Guards. In addition, instead of personal searches the Uniformed Guards used an electronic magnetometer which is the only significant change in the atmosphere from the week before. As indicated above, there were uniformed guards in the hallway ouside the courtroom in full view of the jury during the first week. In the week following the weekend incident the number of Deputy United States Marshals did increase. However, they were seated in various locations around the courtroom with no indicia that they were law enforcement personnel. In this regard, it should be noted that the case cited by one of the defendants, Dorman v. United States, 435 F.2d 385 (D. C. Cir. 1970) having to do with the presence of United States Marshals seated directly behind each one of the defendants is clearly inappropriate in this circumstance. It is conceded that there were Deputy United States Marshals seated behind each one of the defendants in this case. However, there is a significant difference; that is, the Deputy United States Marshals in the District of Columbia District Court wear United States Marshal badges on their lapels of their suits. The Deputy United States Marshals in the courtroom in the Northern District of New York were not wearing badges nor have they ever worn badges. They are simply dressed in normal business suits with no firearms showing nor any other indicia of law enforcement involvement.

The defendants Talerico, Mazza, and Zogby appeared each day in non-jail garb or suits just as they had the week before when they were out on bail. The jury never saw them in handcuffs or chains. Each time the jury entered the courtroom, these defendants were already seated at counsel table with no difference in their appearance from the previous week. The jury was never aware that they were in custody.

Whether or not any adverse effect to the defendants was caused by the increased number of deputy marshals in the courtroom is a matter for mere speculation. The atmosphere of that courtroom was prompted entirely by the actions of the defendants. Specifically, those matters covered in the sealed pre-trial hearing, the defense requests for a nonpublic trial, or watchfulness over the spectators and the codefendant King's violent illegal activity over the weekend were all contributing factors for this courtroom atmosphere. If it were prejudicial to the defendants, it is something that was brought upon as a result of the defendants' conduct. It is clear from the ruling of the trial judge, however, that is was not the atmosphere that was prejudicial to the defendants.

It is interesting to note that the trial court made substantial efforts to keep out of the record and made substantial warnings to all counsel to be certain to eliminate any reference to the weekend incident from any of their examinations of the defendant King at the hospital (pp.

832-833). Yet, in his summation, the defense attorney for the defendant King deliberately asked the jury to consider Mr. King's absence; deliberately attempted to cause them to speculate about the increased number of United States Marshals in the courtroom; deliberately attempted to cause them to speculate as to why they were sequestered; called to their attention, deliberately, the security placed in the court house; deliberately attempted to cause them to speculate as to why the defendant King was in the hospital; and if not for the diligent efforts of the trial judge, may have gone even further (pp. 905-907).

There has been absolutely no showing that either the atmosphere of the trial nor the actual incident of the weekend had done anything to prejudice the defendants in the eyes of the jury and in all of these circumstances it cannot be said that the trial judge abused his discretion in refusing to declare a mistrial. In *United States* v. *Marshall*, 458 F.2d 446, 451-452 (2d Cir., 1972), this court affirmed a trial judge's decision refusing a mistrial citing earlier decisions affirming this exercise of discretion by this same trial judge; that is, *United States* v. *Aviles*, 274 F.2d 179 (2d Cir. 1960), *cert. denied*, 362 U.S. 974 (1960), and *United States* v. *Bentvena*, 319 F. 2d 916 (2nd Cir. 1963), *cert. denied*, *sub nom.*, *Ormento* v. *United States*, 375 U.S. 940 (1963). In the *Marshall* case a codefendant, in front of the jury in open court, did such things as throwing a water pitcher at government counsel, throwing a chair at the jury box, and attempting suicide, as well as uttering obscenities. In *Marshall*, it is clear from the beginning that it was deliberate conduct on the part of the defendant and it was likewise clear that the *Marshall* jury clearly knew about that conduct, a fact nonexistent in this case, that is, the instant jury had no way of knowing about the codefendant's activities. Yet it is clear from the record in the instant case that the defendants did deliberately attempt to take advantage of the codefendant's criminal activity. Just as in the Marshall case, this court should sustain the trial court's denial of the mistrial motion. The language of the Court in Aviles, quoted in Bentvena and in Marshall is very appropriate for this case as well:

> Manifestly is was not error to deny the mistrial motions. If such conduct by a co-defendant on trial were held to require a retrial it might never be possible to conclude a trial involving more than one defendant; it would provide an easy device for defendants to provoke mistrials whenever they might choose to do so. Under all the circumstances the trial judge's instructions adequately dealt with the situation and his denial of the mistrial motions was proper.

In this case, the basis for the defendants' mistrial motions were deliberate activities on the part of the defendants. The trial had progressed to within a few moments of the conclusion of the government's case, that is, the entire case had been presented to the jury with the exception of the playing of two tape-recorded conversations. The trial court had taken great pains to keep out of the record prejudicial testimony relating to the collateral criminal activities of the defendants with the victim Sackman as well as all the other matters brought out in the sealed, pretrial hearing. In addition, that sealed, pretrial hearing brought home what had already been obvious to all concerned, that the chief witness, J. Schuyler Sackman, was in danger. To have declared a mistrial and required a new trial would have only increased the dangers for the government's chief witness as well as the danger for defense counsel who himself alleged he was in danger. In short, the trial had proceeded to such a point in a very careful manner that to have declared a mistrial at that time as a result of deliberate conduct on the part of defendants, would have been an abuse of the judge's discretion. Therefore, his denial of those motions for mistrial should be sustained by this court.

## POINT II

## THE TRIAL COURT'S REFUSAL TO *VOIR DIRE* THE JURY WAS NOT ERROR IN THE CIRCUMSTANCES OF THIS CASE.

The defendants contend that it was error for the trial court to have refused to *voir dire* the jurors as to their knowledge of the weekend incident. Again, such a matter is entirely up to the discretion of the trial judge who was fully aware of the atmosphere of the trial, the nature of the inquiry, the probable effect of such an inquiry on the jury, the necessity for such an inquiry as well as the effect of any delays caused by such an inquiry. Clearly, in the circumstances of this case, the trial court did not err in denying this motion to *voir dire* the jury.

The defendants' briefs rely primarily upon instances where there were very clear, specific communications to the jury; for the most part, juries which were not sequestered. In addition, the reports of those cases do not indicate whether or not any of the circumstances such as those in this trial existed in those other cases. That is, this jury was sequestered for the specific reason of avoiding undue, outside influences. This jury was prevented from any outside communication. The trial court conducted its inquiry to determine if there was any way that the jury could have learned of the incident and satisfied itself that the jury had not learned of the incident. From the very beginning of this trial, it was replete with intrigues and allegations of deliberate criminal activity to obstruct justice and the orderly process of this trial. The trial judge had before him evidence of attempts to bribe jurors, evidence of attempts to suborn prejury, evidence of attempts to kill the principal government witness, J. Schuyler Sackman. The trial court was aware of the difficulty of eliciting the victim Sackman's testimony without getting into other criminal activity of the defendants which would have been prejudicial to them. Through the diligent efforts of the presiding trial judge this prejudicial material was kept out of the record, to the advantage of all the defendants. In addition, the court was aware of the difficulty of accomplishing this feat at a second trial, the court was aware of the difficulty in scheduling multi-defendant trials, the court was aware of the likelihood that other threats, which had been made known to the trial judge in the sealed pre-trial hearing, would be carried out should there be any further delay in this trial.

As the court's ruling below made clear, it considered all of those factors and decided that to avoid the risks involved, he would not only deny a motion for mistrial, but likewise would not risk further disruptions by needlessly conducting a voir dire of the jury which could not possibly have known about the weekend incident because of the safeguards imposed by that judge. Any voir dire of that jury would have served no purpose but to cause that jury to speculate as to precisely the things about which it should have no concern. It is clear from the summation of the attorney for the defendant King exactly how that voir dire would have proceeded. The risk of causing a mistrial at that stage was so great that it heavily outweighed any benefits that could have been derived from conducting the voir dire. With the record clear that the jury had no idea of what took place over the weekend, with the trial so near completion after having been such a fair trial, due to the successful efforts in keeping out prejudicial material, with the very reasonable belief that further delay would only serve the purpose of defendants in bringing on other disruptions or grounds for mistrial, the court exercised its discretion in an eminently reasonable way by denying this voir dire hearing of the jury.

The defendants make much of the fact that the jury had to be speculating about the defendant King's activity particularly in view of the trial judge's admonition to the jury at the hospital "nor are you to speculate about Mr. King being here. Suffice it to say, over the weekend he was injured." (p. 859). As the trial court indicated, the jury would have been fools not to realize that the defendant King had been injured over the weekend after seeing him in a healthy condition on the Friday evening at their recess (p. 1065). The court examined Mr. King's appearance prior to allowing the jury to see him and hear his testimony and satisfied himself that there was nothing shocking or prejudicial to the defendant King or to the other defendants, in his appearance (p. 831). It was apparent that the nature of his injury was as consistent with an automobile accident as it was with gun shot wounds.

The trial court was fully aware of all the circumstances of this trial and what it was that the jury knew about. Any evidentiary hearing to determine if there was any prejudice was properly denied, particularly since the court did in fact satisfy itself that there was no prejudice. Such a denial of an evidentiary hearing can be affirmed in circumstances such as these where the trial judge presiding over his courtroom is the only one in a position to adequately evaluate the necessity for such an evidentiary hearing. Just as in United States v. Borelli, 435 F.2d 500, 504 (2d Cir. 1970), cert. denied 401 U.S. 946 (1971), this court should affirm the trial judge's denial of that request for a hearing.

The defendants make much of the court's admonition to the jury that if anyone talks with them about the case they should so advise the FBI. They contend that this was, in effect, cutting off their right to determine whether or not there was any prejudice to the defendants as a result of the weekend incident. Certainly such an admonition in open court served the healthy purpose of preventing continued harrassment of the trial jurors by defense counsel or defendants' families to strain to find someway to convince a juror that he did, in fact, know about the weekend incident. But, regardless of that, it is clear that the court was entirely justified in so admonishing the jury upon all the facts in this record. The court heard in the sealed pretrial hearing that the defense would attempt to reach a juror. If the defense would attempt to reach a juror prior to trial, it certainly would attempt after trial. In addition the evidence indicated that these defendants were men of violence and criminal means. In addition the defendant King was apprehended after his violent criminal act at the very motel where the jurors were staying. Finally, once the jury entered its verdict, there were numerous outbursts from the spectator section of the courtroom in protest of the jury's verdict. With all these factors in mind, certainly the court had ample reason to advise the jury that if anyone approached them, they should notify the Federal Bureau of Investigation. It was clearly appropriate for their own protection. The wisdom of that admonition was brought home all the more clearly when within one half hour after the jury returned its verdict, an anonymous telephone call threatening the jury was received (p. 1060).

## POINT III

## IT WAS NOT ERROR FOR THE COURT TO PROCEED IN KING'S ABSENCE UNDER ALL THE CIRCUMSTANCES.

The defendant King claims that it was error for the trial court to proceed to complete the trial in his absence. In addition, he claims that it was error to hold a hearing in regard to the voluntariness of his absence without his being present and, finally, he contends that it was error for the court to refuse to continue the trial and the post trial hearing at the hospital. The government submits that the court's ruling below was based upon substantial evidence and was a proper exercise of that court's discretion in view of all the circumstances.

Continuing the Trial in King's Absence - On the Monday following the week-end incident the government moved for continuing the trial in King's absence based upon United States v. Tortora, 464 F.2d 1202 (2d Cir., 1972), cert. denied, sub nom, Santoro v. United States, 409 U.S. 1063 (1972). In the Tortora case which was a similar prosecution for violations of Title 18, U.S.C. §§892-94, the codefendant Santoro was present on August 10, 1971, when the case was called for trial, but because of claimed illnesses of codefendants and other sham attempts at delay, the court reset the trial date for August 16, 1971. On August 16, the defendant Santoro failed to appear, was subsequently apprehended, and pled guilty to bail jumping. During his absence, however, the trial court impanelled the jury and proceeded to try him in absentia. The Tortora case bears a striking resemblance to this case, not only in that it concerned a violation of the same statute, but many of the critical factors involved in the Tortora decision are involved in the instant case. The only apparent differences are that Santoro simply committed the crime of bail jumping to defeat the progress of his trial whereas here, the defendant King committed a crime of violence against an FBI agent for the only apparent motive of obstructing the progress of his trial. Another more significant difference between the two cases is that Santoro was not even present for the selection of his jury nor for any part of his trial, yet this, the Second Circuit Court of Appeals, affirmed his conviction and the Supreme Court has refused to review that case. In the instant case, the defendant King was present for the entire government case with the exception of the playing of two tape-recorded conversations which tape recordings the defendant King had already heard and transcripts of which he had already read. The defendant King had an opportunity to participate in his own defense by testifying. If the conviction of the defendant Santoro in the case of *United States* v. *Tortoro*, *supra*, was affirmed in the circumstances of that case, certainly this court should affirm the conviction of the defendant King in the circumstances of his case.

On Friday, February 23rd, 1973, the defendant King was present in court for the completion of that day of trial at which time the jury was excused and everyone was notified to return to court to resume trial Monday morning, February 26, at 10:00 a.m. As determined in the post-verdict hearing, the defendant King on Saturday, February 24, 1973, alighted from an automobile, crossed the lawn of the Senior Resident Agent of the FBI in Utica, N. Y., walked up to the window in the front of his house, smashed it by throwing into the house a hand grenade, turned around and fled the scene, with shooting erupting at that point. As the court determined from the remarks of counsel on Monday morning, and from newspaper accounts, the defendant King was subsequently apprehended at the Ramada Inn, which it was disclosed on the Monday following the incident, was the motel in which King's trial jury was sequestered.

After determining what took place over the weekend, the court, based upon United States v. Tortora, supra, ruled that the defendant King's absence was voluntary and knowing, and that the trial should proceed in his absence. As this court indicated in Tortora, like any constitutional guarantee, the defendant's right to be present at trial, may be waived. Snyder v. Massachusetts, 291 U.S. 97, 106 (1934). Even if that waiver is implied from the defendant's conduct, Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057 (1970). The court in Tortora went on to indicate that the Supreme Court had long held that a defendant who knowingly absents himself from the court room during trial "leaves the court free to proceed with trial in like manner and with like effect as if he were present." Diaz v. United States, 223 U.S. 442, 445, 32 S.Ct. 250 (1912). The Tortora court went on to indicate that waiver of a constitutional right must be both "knowing" and "voluntary". A defendant who deliberately fails to appear in court does so voluntarily and thus the important question is whether his absence can be considered a knowing waiver. The Tortora court went on to indicate that it could be a knowing waiver because deliberate absence of a defendant who knows that he stands accused in a criminal case and that the trial has begun on a day certain indicates nothing less than an intention to obstruct the orderly processes of justice. In the instant case the defendant King was present for one week of trial and as the court below indicated, heard the overwhelming evidence against him. Then as the government's case was concluding, the defendant King went to the home of the Senior Resident Agent of the FBI and threw a hand grenade through the front window of that home. As the trial court below indicated that deliberate crime of violence voluntarily committed by the defendant King must carry with it the full responsibility for the consequences of his act including the fact that his escape was hindered by law enforcement officers who seriously injured him by gun shot wounds. These gun shot wounds which were the direct consequence of his voluntary criminal activity to obstruct processes of justice caused his absence on Monday morning when the trial was to resume. The trial court below was certainly justified in continuing the trial in those circumstances. As the Second Circuit indicated on several times and reasserted in the *Tortora* case, no defendant has a unilateral right to set the time or circumstances under which he will be tried, citing *United States* v. *Bentvena*, 319 F.2d, 916 (2d Cir.) cert. denied, 375 U.S. 940 (1963).

The Second Circuit in *Tortora* went on to indicate that the defendant is released before trial on the specific condition that he will return, stand trial, and submit to sentence if he is found guilty. Without this obligation on the accused the disposition of criminal cases would be subject to the whims of defendants who could frustrate the speedy satisfaction of justice by absenting themselves from their trials. As the Second Circuit indicated and as the trial court below indicated, today, more than ever, the public interest demands that criminal proceedings be prosecuted with dispatch. The greater the delay between the charge and the trial date, the greater the likelihood that witnesses will be unable to appear, that their memories will have faded, and that their testimony will be less convincing. As the Second Circuit indicated in *Tortora*, that a defendant can be convicted of bail jumping if he fails to appear for trial, is not sufficient to vindicate the public interest; the public is entitled to a speedy disposition of the criminal charges absent a finding by the court "that good reasons exist for the delay. 'Thus governmental prerogative to proceed with the trial may not be defeated by conduct of the accused that prevents the trial from going forward.' " citing *Illinois* v. *Allen*, *supra*, 397 U.S. at 349 (Brennan, J. concurring). "A defendant's knowing and deliberate absence does not deprive the court of the power ... to continue [the trial] until a verdict is reached." *Tortora*, *supra*, 464 F.2d at 1209. The same logic applies in this instance. The mere fact that the defendant King may stand trial at some later date for the throwing of this hand grenade is not sufficient to vindicate the public interest in the prompt disposition of the charges against him. He should not be allowed by his deliberate criminal conduct to obstruct that trial that is in progress. Just as the court in Tortora indicated that the absent defendant Santoro had received adequate notice that his trial was proceeding, had received adequate opportunity to present his defense, and therefore his conviction complied with all the requisites of the Constitution as well as Rule 43 of the Federal Rules of Criminal Procedure, the court in the instant case should likewise rule that the defendant King had adequate notice that his trial would proceed on Monday, February 26, 1973, that he did in fact have an adequate opportunity to present his defense and in this instance, did present his defense. Therefore, his conviction complied with all the requisites of the Constitution as well as Rule 43 of the Federal Rules of Criminal Procedure.

The Tortora court indicated that it was not laying down a general rule about proceeding in the absence of defendants who are voluntarily absent after impaneling of the jury. The Tortora court did indicate that it was holding, that it was within the discretion of the trial judge to be utilized only in circumstances as extraordinary as those in this Tortora case. The Tortora court indicated that this discretion should be exercised only when the public interest clearly outweighed that of the voluntarily absent defendant. That court set out the factors that the trial judge should consider when exercising its discretion. The court indicated that the trial court must weigh the likelihood that the trial could soon take place with the defendant present. As to the defendant King it was clear there would be at least two months before he had adequately recovered to come to court. The Tortora court indicated the trial court should consider the difficulty in rescheduling, particularly in multiple defendant trials; in this case there were four defendants on trial with four respective defense attorneys. The trial court was a visiting judge. Trial sessions in the Northern District of New York are not held daily. To have terminated this trial would then have required the trial court to have awaited the next trial term which would not occur until several weeks later in the city of Albany, New York, which would have been a substantial inconvenience for all the parties involved who were from the city of Utica. The Tortora court indicated that the trial judge should consider the burden on the government in having to undertake two trials, again particularly in multiple defendant trials where the evidence against the defendants is often overlapping and more than one trial might keep the government's witnesses in substantial jeopardy. Tortora, supra, 464 F.2d at 1210. Just as in Tortora, where the government's case rested almost exclusively on the testimony of one witness who had already been threatened on numerous occasions by the defendants in that case, the case against the defendant King and his codefendants here depended almost entirely upon the testimony of the victim, Mr. J. Schuyler Sackman. Not only was the trial testimony replete with threats of and actual violence to the victim Sackman with use of such weapons as knives and loaded guns, but in addition, the trial judge presided over a hearing in which it was discovered that the defendants in this matter were considering plans for the murder of the victim-witness Sackman. Again, as indicated by the trial court, one of the allegations the judge had discovered in the pre-trial hearing, had already materialized and it would have been unwise to delay that trial to allow the other threats to have materialized. As the Tortora court indicated extensive delays would almost certainly have accompanied any adjournment and the government's main witness would have continued to be in potential danger until his testimony was completed. Severance would have added substantially to the burden on the government and its witnesses necessitating two trials in the place of one. "It would have been an unwarranted delay in the expeditious administration of justice. Moreover, the danger to the government's witness would have continued until that indefinite time in the future when the witness's testimony in the second trial would have been completed." Tortora, supra 464, F.2d at 1210. In view of this court's clear guidance in that Tortora case and the facts in the trial below, the trial court below was compelled to proceed in the defendant King's absence to the completion of this trial.

Any harm to the defendant King as a result of his absence from trial was minimized however because the defendant King had in fact confronted the witnesses against him by hearing all of the government's case with the exception of two tape recordings. Those two tape recordings, the defendant King had heard in pretrial discovery sessions and he had also received transcripts of those tape recordings. In addition, his defense counsel proceeded to vigorously represent him throughout the trial. The court accommodated the defendant King and as the court indicated at some risk to the jury and court personnel and at great inconvenience to a busy hospital by taking the entire trial to the hospital where the defendant King was allowed to testify in his own behalf in a hospital auditorium which was in fact a cafeteria used for meetings as well as for cafeteria service.

Not only did the defendant King hear all the government's evidence, and have an opportunity to put in his own defense and testify in his own behalf, but further he was allowed to do it in circumstances that would only incur sympathy for him. As discussed in other parts of this brief, the defendant King's appearance was as consistent with injuries sustained in an automobile accident as with gun shot wounds. The jury knew only that the defendant King had been injured over the weekend. It was certainly a scene likely to result in sympathy for the defendant King when he testified from his hospital bed. The length of the government's cross-examination of the defendant King was curtailed considerably in order to avoid causing any discomfort to the defendant King and to attempt to reduce some of the sympathy that the jury might feel for the defendant King. However, defense counsel for the defendant King went on, in spite of the court's instructions and argued to the jury that it should consider Mr. King's absence from defense counsel's table in the courtroom, and think about why he was in the hospital. This was either a deliberate attempt at causing a mistrial or certainly exploitation of the defendant King's sorry condition.

Presence at the Hearing to Determine Voluntariness - The defendant King argue in his brief that it was error for the court to determine whether or not his absence was voluntary while he was not present in the courtroom to assist his counsel. It should be noted as it was by the trial court that the hearing on this voluntariness issue had been scheduled for 2:00 in the afternoon after the jury had returned its verdict. (p. 1042). The hearing actually began at 3:00 P.M. (p. 1043). This hearing, which the defense counsel argued was necessary, was adjourned until 3:00 to accommodate the defense counsel who wished to go to the hospital to consult with his client about the hearing (p. 1073). The defense counsel certainly had adequate opportunity to receive the assistance of his client to discuss the proposed hearing that afternoon. At that hearing it was very clearly established that the defendant King did take the voluntary steps that ultimately resulted in his injuries that prevented him from attending the remainder of the trial in court. The hearing on the voluntariness issue certainly should not have been delayed until the defendant King could be present since the trial judge fully familiar with all the facts and circumstances was a visiting judge from the Southern District of New York and it was a hearing that should most appropriately have been before that same judge. The hearing did not require King's presence. His presence was not possible. It was not a criminal trial. He was represented by counsel throughout the hearing, counsel [illegible] have an opportunity to cross-examine the wit[illegible] and it should be noted that there was only one witness called, so that whatever the defendant King missed by being absent from that hearing was not substantial.

Continuation of the Trial at Hospital - The defendant King in his brief argues that it was error for the court to refuse to continue the trial at the hospital in the defendant King's presence. As the court below ruled, continuation of the trial at the hospital would have been impossible and in the circumstances of this case inappropriate as the court indicated it was at some risk that the jury was taken to the hospital, particularly in view of the threats revealed in the pre-trial hearing as well as the circumstances of the King apprehension in the parking lot of the jury's motel. In addition, there were no facilities available to secure the prisoners nor to adequately co[illegible] spectators or to house the jury for deliberations. The room used for taking the defendant King's testimony was a cafeteria. The doctor at the hospital and defense counsel referred to it as an auditorium; however, as the court noted it was a cafeteria or meeting room and was required by the hospital for use as a cafeteria. To have continued the trial there would have been impossible without interrupting the critical functions of that hospital. The court's witness, Dr. Millet (pp. 823-831) indicated that the defendant King certainly was rational but could only participate for approximately one hour at a time. This would thus require constant interruptions and delays in the trial. In addition, it is noted that during the course of the defendant King's very brief testimony he began to choke up and the court had to take a recess. Certainly the trial court below was correct in its expectation that continuing the trial in King's presence at the hospital not only would be an unjustified risk for the jury, witnesses, the Marshal's and court personnel but also a substantial inconvenience to the hospital, and an unnecessary prolongation of the trial. Consequently, it is submitted that the trial court acted perfectly proper in denying the defendant's request to continue the trial at the hospital.

With all these factors in mind it is certainly clear that the defendant King knowingly and voluntarily waived his right to be present at the remainder of his trial and in addition, the continuation of this trial as the record indicates resulted in no prejudice to the defendant King, he was not prohibited from doing anything that he would have done if he had not been injured. Therefore, it is submitted this court should affirm the ruling of the court below.

## POINT IV

### THE TRIAL COURT'S DENIAL OF THE PRE-TRIAL MOTION TO DISMISS THE INDICTMENT BASED UPON ALLEGATIONS CONCERNING THE DEFENDANT MARRONE WAS PROPER.

The defendant King argues in his brief that the trial court erred in not granting the defendant's motion to dismiss the indictment on the grounds that the co-defendant Marrone had become an informer and had revealed the defense of the defendants to the FBI and United States Attorney's Office.

On Tuesday morning, February 20, 1973, the defendants had moved for a dismissal of the indictment making these allegations, after learning that the co-defendant Marrone had been severed from the trial of these co-defendants on the previous Friday. The trial court allowed the defendants a hearing to determine what, if any, defense strategy the defendant Marrone had revealed to the United States (pp. 4-116). The hearing consumed the better part of one and one-half days and the defense examined and cross-examined witnesses at length, including the defendant Marrone and two FBI Agents who had been contacted by Marrone. The Court sealed that hearing, his ruling on that hearing, and his post-trial opinion on his ruling, in view of the allegations brought forth during that hearing which could jeopardize the personal safety of the parties involved or the personal reputation of those parties against whom certain allegations were made. At the conclusion of the hearing all defense counsel joined in the motion to dismiss the indictment alleging that their defense had been revealed to the Government and they had thereby suffered prejudice and the Court denied the motion.

Not Governmental Intrusion - The hearing established that the defendant Marrone did, in fact, contact FBI Agents. The record is clear that the defendant Marrone himself initiated these contacts and not the Federal Bureau of Investigation or the prosecution, in general. Marrone was ultimately tried, convicted and sentenced for his part in the crime demonstrating that he was not an informant for the government on this case. Further, the record very clearly indicates that any information pertaining to the case then in progress was clearly volunteered by the defendant Marrone and not sought by the Federal Bureau of Investigation (p. 37). In fact, the record is clear that the Government took positive steps to instruct the members of the Federal Bureau of Investigation to instruct the defendant Marrone that they were not interested in hearing anything about the defense of the case then in progress (pp. 36, 43).

What If Anything Was Learned - The hearing established that the defendant Marrone related to the FBI various illegal activities on the part of the defense to attempt to obstruct justice in this case (p. 16). The court below ruled properly that the FBI had a duty to investigate the allegations on the part of the defendant Marrone of further illegal activity to obstruct justice.

In addition, through leading questions the defense attorneys established that the defendant Marrone may have discussed with agents of the Federal Bureau of Investigation some tactics that the defense might attempt, which tactics although not in violation of any law, were inadmissible or otherwise useless. For example, the defense attorneys attempted to establish that the defendant Marrone advised the government that the defense would attempt to impeach the victim in this case, J. Schuyler Sackman, by calling witnesses from Puerto Rico with whom Sackman had prior dealings, in which those witnesses lost money. This defense strategy, in addition to being inadmissible, as indicated by the trial judge and argued elsewhere in this brief, was not learned through the defendant Marrone, as defense counsel had argued. The hearing does, in fact, indicate that the defense attorney Brindisi had advised another Assistant United States Attorney involved in other litigation with the attorney Brindisi, that he, Brindisi, was in fact going to Puerto Rico and would not be able to keep an appointment previously scheduled for that other matter. The Assistant United States Attorney in charge of the prosecution of the instant case, Eugene Welch, explained in the hearing that Assistant United States Attorney Wildridge relayed to Welch that Brindisi was going to Puerto Rico to interview witnesses in regard to the victim Sackman. It is a matter of dispute as to whether or not attorney Brindisi did in fact advise Assistant United States Attorney Wildridge the purpose of the trip to Puerto Rico, but is is not disputed that he did, in fact, advise Wildridge of the trip. This trip was scheduled very close to the beginning of this trial and it was certainly known to the government that the victim Sackman had prior business dealings in Puerto Rico. Consequently, not only was this information, if it was in fact received from the defendant Marrone, useless to the government, but it was also clearly available to the government from non-informant sources.

Certainly, the defense strategy of attempting to impeach Mr. Sackman's credibility was no revelation to the government. It was clear from the beginning of the prosecution of this matter that the credibility of the witness Sackman was crucial. He was to be the principal witness against the defendants and, therefore, attempts to impeach the victim Sackman were anticipated.

The defense attorneys attempted to establish that the defendant Marrone revealed to the government a defense strategy of placing the entire blame for this extortionate extension of credit and the collection by extortionate means on to the defendant Marrone. If, in fact, that defense strategy was related by the defendant Marrone to the government, the defendants were not prejudiced for it was certainly not a new or novel strategy. The government had heard the tape recordings of the defendants' threats on numerous occasions. It is clear from those tape recordings that the defendant King constantly related to the victim Sackman that it was the defendant Marrone's loan, attempting throughout the course of the commission of the conspiracy to place the blame for Sackman's troubles with the loan collectors on the defendant Marrone.

The defense, through its leading questions, attempted to establish that the defendant Marrone advised the government that the defendant Zogby would call alibi witnesses. Whether or not this information was ever obtained by the defendant Marrone and relayed to the government, is not clear from the record established at the hearing. What is clear, however, is that the case against the defendant Zogby was based upon an eye-witness identification by one eye-witness. The defendant Zogby did not appear on any of the tape recordings in the possession of the government. It was expected long in advance of the prosecution of this matter, that the defendant Zogby would attempt

establish that he was at some other place, other
han at the scene of the crime on the night, and date,
nd time in question. In addition, on February 1,
973, at the calendar call of this matter when miscel-
aneous motions were disposed of by the presiding
rial judge, the defendant Zogby's court appointed coun-
el approached the court in the presence of Assistant
Jnited States Attorney Welch, requesting that the court
ppoint a private investigator to investigate the story of
libi witnesses that the defendant had suggested to his
ttorney. The defense attorney indicated that before
e put the witnesses on the stand, he felt their stories
should be verified by independent investigation. The
Court suggested means by which the defense attorney
could verify the stories short of the court's paying for
a private investigator; but it is clear that information
concerning potential alibi witnesses was available to
the government independent of any informant.

As to the defendant Mazza taking the witness stand it is not clear from the testimony whether or not this was a tactic suggested to the defendant Mazza by the defendant Marrone, or whether it was something the defendant Marrone had heard outside of defense discussions. It is clear that the defendant Marrone did relate something about the defendant Mazza taking the witness stand to claim that he was in fact with Mr. Sackman on November 18, 1972, concerning the collection of a loan, but that he was there at the request of the defendant Marrone's wife. As the court below ruled, this is certainly no defense. It is such a confused story that the agent to whom the defendant Marrone relayed this information, discarded it either because he thought it was idle rumor, or simply did not understand it. The record in the hearing clearly indicates, however, that the agent never relayed it to the prosecution. The prosecution learned of it for the first time at this pre-trial hearing requested by the defense, when the defense brought it out through its questions.

As to the defendant Talerico, it is clear from the hearing, that there was absolutely no discussion by the defendant Marrone concerning anything about the defendant Talerico.

In addition, the FBI witnesses testified that they conducted absolutely no investigation into any of the matters that the defense attorneys inquired about in the course of that hearing as a result of anything Marrone may have volunteered to them.

It is clear from the record below that the government did not intrude into the defense camp, that the government did not benefit from any of the information volunteered by the defendant Marrone, that the defendants did not suffer any prejudice as a result of Mr. Marrone's attempts to volunteer information to the FBI and that there was no basis for dismissal of the indictment.

Ruling Below - The court below ruled, after hearing the testimony in the sealed hearing, that the government had learned absolutely nothing of any value from the defendant Marrone, that the defendants had suffered no prejudice from Marrone's attempts to volunteer information to the government. At the end of the trial, after being fully advised of all the circumstances prior to trial, and after presiding over the entire trial and hearing all the evidence and all the defenses, the court again held that even assuming the government did intrude into the defense camp, the government obtained nothing from it, nor did the defendants suffer any prejudice from it. The court did not hold, however, that the government had intruded into the defense camp. (See pages 1048 through 1050.)

The court went on to indicate that, more specifically, there was evidence that the defense planned illegal criminal acts which lacked probative value at this trial but would have interfered with the administration of justice and would have obstructed this trial. It was therefore the clear duty of the FBI to avail themselves of that information for the legitimate purpose of preventing obstruction of justice and for the legitimate purpose of ferreting out the commission of such crimes.

The defense in its appeal relies upon *O'Brien* v. *United States*, 386 U.S. 345, (1967), *Black* v. *United States*, 385 U.S. 26 (1966), *Caldwell* v. *United States*, 205 F.2d 879 (D.C. Cir., 1953), *cert. denied*, 349 U.S. 930 (1955), and *Coplon* v. *United States*, 191 F. 2d 749 (D.C. Cir., 1951), *cert. denied*, 342 U.S. 926, (1952). Each of those cases involved deliberate governmental intrusion during the trial, or, if not during the trial, remaining undisclosed until after the trial. Each of those cases was reversed and remanded for a new trial. None of those cases was ordered to be dismissed as a result of the intrusion into the defense camp. In fact, Caldwell was retried and convicted on remand. See 218 F.2d 370, n.1 (D.C. Cir., 1955).

In the case before this Court all of the information which may have been learned from the cooperating co-defendant who is alleged to be an informant in the defense camp, was made known to defendants and their counsel prior to the trial so that if, in fact, any information of any value was obtained from the defendant Marrone it was not to the prejudice of these defendants and did not deny them a fair trial because they learned about it prior to trial, not after trial.

In addition, it must be pointed out that this was not a case of gross deliberate intrusion into the defense camp. It is clear from the beginning that the defendant Marrone volunteered the information to the FBI. At one point, on the record in the hearing, there was some indication that perhaps it was even some deliberate attempt at obstructing justice that the defendant Marrone was volunteering this information and attempting to cooperate with the FBI while remaining a defendant in the case about to be tried. Regardless of that, it is clear that this is not a situation where the government surreptitiously invaded

A 214

the defense camp throughout the trial. This is not a case where the government took positive action to intrude upon the defense camp. In fact, the record is clear that when the FBI agents contacted by the defendant Marrone advised the prosecutor in the case, the prosecutor instructed the agents to refrain from discussing the merits of the defense of the case in progress.

It is clear, however, that the agents of the FBI were not required to refuse to talk with the defendant Marrone who was relating information concerning collateral illegal activity on the part of the defense. The presiding trial court was careful throughout the trial to make certain that none of the evidence of this collateral illegal activity crept into the testimony in the trial. There was very clearly nothing obtained from the defendant Marrone that was sought to be admitted against co-defendants at their trial. The situation is not entirely different from that in U.S. ex rel. Cooper v. Denno, 221 F.2d 626, (2d Cir.), cert. denied, 349 U.S. 968, (1958), wherein this circuit denied habeas corpus relief to a defendant who alleged that a police officer had been placed in a position in the court room to overhear privileged defense conversation. The court there indicated that the police officer was not planted to intrude on the defense but rather his presence was necessary for the security of the court room. If anything, the presence of the FBI agents contacting the defendant Marrone, at his request, was necessary for the continued security and unobstructed processes of justice in this case.

In South Dakota v. Long, 465 F.2d, 65, 72, (8th Cir., 1972), cert. denied, _______ U.S. _______ (1973), the Court of Appeals for the Eighth Circuit refused to upset a conviction as a result of the State's prosecuting attorney overhearing and recording a privileged defense courtroom conversation, because it was not the type of "surreptitious invasion" that was criticized in the Caldwell and Coplon cases.

Similarly, the Second Circuit has denied an appellant's similar claim on the basis that the government did not receive information of any value from the defendant who began to cooperate with the government after the prosecution had commenced, and for the further reason that there was no attempt whatever to elicit at the trial of these defendants any of the conversations that the suddenly cooperating co-defendant may have overheard, United States v. Mosca, 475 F. 2d, 1052, 1060, (2d Cir., 1973).

It was the position of the government at the conclusion of the pre-trial hearing of this matter, and it is the position of the government at this time, that this case had not yet gone to trial when all the ramifications of Marrone's involvement with the FBI and with the defense of co-defendants was made known to the defense; it was not a deliberate intrusion by the government; the defendants had not suffered any prejudice; and there was no error in the trial court's ruling.

The defendant had been availed a full and complete disclosure of the involvement of the defendant Marrone with the Federal Bureau of Investigation in relation to any defense strategy prior to any trial. In United States v. Zarzour, 432 F.2d, 1, 3-5, (5th Cir., 1970), the Court of Appeals reversed and remanded the matter back to the trial court for a review of the FBI informant file involving a private investigator who was hired by the defense to conduct its defense investigation. Unknown to the defendant at that time, that investigator was also a paid FBI informant. Although the FBI and the private investigator denied getting any defense information, in view of the fact that none of this was disclosed until after the trial, the Court of Appeals there reversed and remanded it back to the District Court instructing the District Court to review the file in regard to the private investigator to determine what, if anything, was learned and disclosed to the FBI in regard to his defense. If anything was contained in those reports relevant to the defense, the trial court was ordered to make those relevant parts available to the defendant and to *proceed to a new trial*. It is submitted that, in this instance, these defendants did receive any and all information that the government may arguably have received from the defendant Marrone in the hearing conducted by the presiding trial judge. They are now in the position of the defendant in the *Zarzour* case after it was remanded. They are in the position of the defendants in all the other cases they have cited after the remand hearings; that is, they were fully advised as to any and all information the defendant Marrone may have given to the goverment prior to trial. There has been no showing and there can be no showing that they were thus denied a fair trial. The defendants, in all the cases cited, were remanded for new trials after such disclosure as these defendants received prior to trial in this case. Therefore, there is no basis for the defense contention that the trial court erred in not dismissing the indictment based upon the allegations concerning the defendant Marrone.

## POINT V

## THE TRIAL COURT WAS CORRECT IN RULING THAT THE CHARACTER OF THE WITNESS, J. SCHUYLER SACKMAN, COULD NOT BE IMPEACHED BY SHOWING PRIOR ACTS OF MISCONDUCT NOT RESULTING IN CONVICTION.

The trial court based its ruling concerning the prior acts of misconduct on two grounds, both of which are direct applications of the law as stated by this court in *United States* v. *Bowe*, 360 F.2d 1 (2d Cir.), cert. denied, 385 U.S. 961, 87 S.Ct. 401, 17 L.Ed. 2d 306 (1966).

The first basis is the rule that "character impeachment by proof of misconduct is not only limited to cross-examination ... but in this circuit, 'specific acts of misconduct not resulting in conviction of a felony or crime of moral turpitude are not the proper subject of cross-examination for impeachment purposes.' " *United States* v. *Bowe*, *supra*, at 15, see also *United States* v. *Sposato*, 446 F.2d 779, 780 (2d Cir. 1971); *United States* v. *Provoo*, 215 F.2d 531, 536 (2d Cir. 1954). Defendant King contends that the rule applies only to a defendant and not a mere witness. In *United States* v. *Glasser*, 443 F.2d 994 at 1003 (2d Cir. 1971), this court stated "this rule is the same when the witness is the defendant", thus making it clear that the rule was meant to be applied to *all* witnesses. Also, both *Bowe* and *Sposato* dealt with the application of the rule to a witness who was not the defendant.

The second basis for the court's ruling was, as stated on page 354 of the trial transcript, "in the exercise of my discretion it would only confuse this jury and divert the attorneys and get them into by-ways in which we are not involved." That a trial judge does indeed have such discretion is stated in *United States* v. *Bowe*, *supra*, at 15, where the court holds that a trial judge has the discretion to exclude evidence where the confusion to the jury and unnecessary delay outweigh the slight probative value of the evidence. See also *McCormick, Evidence*, §152, at 319-320 (1954), 2 *Wigmore On Evidence*, §§443, 444 (1940 rev. ed.)

Defendant Zogby argues in his brief that the court did not allow defendants to call witnesses to testify concerning the reputation of J. Schuyler Sackman as to truth and veracity, citing pages 352-356 of the trial transcript. The evidence offered clearly did not entail proof as to Mr. Sackman's reputation. Defendants offered documentary evidence concerning business transactions in Puerto Rico, a petition in bankruptcy filed by Mr. Sackman, and evidence from a Mr. LoConti that he had been defrauded by Mr. Sackman. This evidence relates only to specific acts, not to Mr. Sackman's reputation, and was properly excluded by the trial court.

## POINT VI

### THE MOTION FOR SEVERANCE WAS PROPERLY DENIED.

The law is clear in this Circuit that a defendant must demonstrate substantial prejudice from a joint trial to gain a severance. It is equally clear in this Circuit that a trial court's decision to deny severance will not be disturbed on review unless there is a showing of clear abuse. United States v. DeSapio, 435 F.2d 272, 280, (2d Cir. 1970), United States v. Borelli, 435 F.2d 500, 502, (2d Cir. 1970), United States v. Peden, 472 F.2d 583 (2d Cir. 1973) and United States v. Adams, 434 F.2d 756 (2d Cir. 1970).

Appellant Zogby claims error in the denial of his motion for severance but does not show any substantial prejudice to his case nor any facts indicating an abuse of discretion.

Appellant Zogby claims that the recorded conversations of co-conspirators were highly prejudicial to him since he was not mentioned in these recordings. This argument is no more than an assertion that Zogby may have had a better chance of acquittal were he tried separately. This alone is not the standard for severance in this Circuit. U. S. v. Colabro, 467 F.2d 973, 987, (2d Cir. 1972), cert. denied 410 U.S. 926 (1973). United States v. Borelli, supra, United States v. DeSapio, supra.

In addition, as the jury verdict on Count VII indicates, the Government amply proved a conspiracy which included defendant Zogby as a co-conspirator with the consequence that co-conspirators' declarations in furtherance of an established conspiracy would be completely admissible against all other co-conspirators, Zogby included.

In its trial memorandum filed prior to this trial and served on all counsel, the government specifically noted that it would request the Court to rule that the declarations of certain co-conspirators are admissible against all the co-conspirators who the government has demonstrated are co-conspirators by a fair preponderance of the evidence of these hearsay declarations. The defendant Zogby never made the hearsay objection which would have required the Court below to have ruled on the government's position.

The argument advanced that Zogby was, in effect, a minor participant in a large conspiracy and that he was thereby automatically prejudiced is easily disposed of by United States v. Vega, 458 F.2d 1234 (CA 2d 1970). See also United States v. Kahn, 366 F.2d 259, 263, (CA 2d 1966), United States v. Bentvena, 319 F.2d 916 930-931.

Appellant Zogby's oblique reference to a possible Bruton problem (Bruton v. United States, 391 U.S. 123, 88 S.Ct. 162, 20 L.Ed. 2d 476, (1968) is answered by United States v. Littman, 421 F.2d 981, 983 (CA 2d 1970).

The case cited by appellant Zogby (United States v. Haupt, 136 F.2d 661 CA 7th - 1943) is inapposite. A simple reading of Haupt shows that the suggestion of severance by the appellate court was for totally different reasons than those advanced by appellant.

## POINT VII

## THE EVIDENCE AND THE JURY CHARGE WERE SUFFICIENT AS A MATTER OF LAW.

Each of the defendants in his respective brief contends that the evidence was insufficient to sustain the jury verdict against him. The government submits that a review of the trial transcript will indicate that the evidence was overwhelming against each and everyone of these defendants. Therefore, the government's discussion of the sufficiency of the evidence will be kept to a minimum. In addition, the defendant Mazza argues under the sufficiency of the evidence, that the trial court erred in not charging the jury in regard to Mazza's knowledge in the manner requested by the defendant Mazza in his request to charge. It is submitted that the trial court properly charged all the elements of the crime set forth in Count VI with respect to defendant-appellant Carl J. Mazza.

*Evidence as to King* - As the trial court below indicated the evidence against King was overwhelming. That evidence established that on September 18, 1972 the defendant King arranged for the transfer of $4,000 as a loan from the defendant Albert Marrone to the victim J. Schuyler Sackman. Previous to September 18, 1972 the defendant King has slapped the victim Sackman in regard to the collection of another unrelated loan. The defendant King contends that this was a matter of self-defense, but the victim Sackman makes it clear that it was as a result of the defendant King's prior collection methods. At any rate, at this stage, the evidence must be viewed in the light most favorable to the government. *United States* v. *[illegible]*, ______ F 2d _________ (2d Cir., June 27, 1973, Docket No. 73-1017, 1048); *United States* v. *D'Avanzo*, 443 F.2d 1224, 1225 (2d. Cir.), *cert. denied*, 404 U.S. 850 (1971). Therefore, on September 18, 1972 the victim Sackman was aware that the defendant King had resorted to extortionate means to collect prior loans.

On September 18, 1972 the victim Sackman received the actual $4,000 from the codefendant Albert Marrone in the presence of the defendant Louis Charles King. It was established that the loan must be repaid by October 18th, with $5,000 due on the original $4,000 loan.

On October 18, 1972 the victim did not have the money and on October 30, 1972 the defendant King set up a meeting between the victim Sackman and two men to discuss the loan. It was on that date, October 30, 1972, that in the presence of the defendant King, Jack Zogby menaced Sackman with a knife, and John Doe subsequently identified and convicted as Delwright Dyman, threatened Mr. Sackman with a loaded revolver. In addition, the defendant Dyman asked the defendant King if it was alright with him to extend to Mr. Sackman more time in which to pay back the loan. Mr. Sackman was given seven to ten days to come up with $1,000 with the remainder of the loan due November 18, 1972. On November 11, 1972, Mr. Sackman again met with Mr. King when the loan was discussed and statements were made by the defendant King which, in all the circumstances, were very clear threats. On November 13, 1972, the victim met again with Mr. King and again, Mr. King uttered threats, and Mr. King collected on the loan by accepting $350. cash from the victim Sackman as a part payment. Mr. King stood by as the defendant Talerico made threats to the victim Sackman. On November 16, 1972 the defendant King met with the victim Sackman and again made threatening statements to the victim Sackman. On November 18, 1972 the defendant King set up a meeting with the defendant Mazza and the victim Sackman, at which time the defendant Mazza beat, knifed, and threatened the victim Sackman over the repayment of the loan. The defendant Mazza on November 18, 1972 gave the victim Sackman until December 1st to come up with the rest of the money. On December

1st, 1972 the victim Sackman was again to meet with the defendant King who, when he appeared for that meeting, was arrested by the FBI. The substance of the defense of the defendant King appeared to be simply that he was nothing more than a friend; an intermediary for the victim Sackman. It was a loan extended to the victim Sackman by the codefendant Marrone. The jury however, saw through this facade and convicted the defendant King who very clearly was a prime mover behind the whole loan-sharking operation involved in this case.

In addition, even if the defendant King's testimony were credited by the jury, they would have had to have convicted him on numerous counts as an aider and abettor.

The Evidence as to Talerico - The defendant Talerico contends that the evidence was insufficient to sustain the jury verdict on the conspiracy charge as well as the substantive charge. Clearly, the evidence was sufficient as to both charges. In addition to the substantive charge which, by itself, would have established the defendant Talerico to be a co-conspirator, there are other factors to be considered as to his guilt in the conspiracy. The defendant Talerico was the only contact for the victim Sackman to the defendant King who was, in fact, the only person with whom the victim Sackman was able to make arrangements for the postponement of the loan or further extensions of time. It is clear, therefore, that the role of Talerico for the most part was one of an intermediary. However, on November 11, 1972, the defendant Talerico proceeded to make remarks concerning the two men who had threatened Mr. Sackman on October 30th, which remarks, in all the circumstances, were very clearly threatening to Mr. Sackman. Although Mr. Sackman did not particularly fear Mr. Talerico as an individual, he was very clearly frightened by the remarks of Mr. Talerico. For example, Mr. Talerico indicated that the two men of October 30, 1972 were Al's friends, were a couple of of nuts, or a couple of punks. They were "from New York". On November 30, 1972 this intermediary went so far as to advise Mr. Sackman as to what to do, in view of the following day, December 1st, 1972, being a due date, and Mr. Sackman's dire status of being unable to make payment on time. Finally, on December 1, 1972 when Talerico and King were to meet Sackman to discuss the loan and pick up of $1,000 past payment, Mr. Talerico fled when he saw the FBI agent sitting in Mr. Sackman's car.

As to the substantive count, it is clear that on November 13, 1972 the defendant Talerico did, in fact, make threatening statements to the victim Sackman in order to frighten him into making further payments, a matter clearly within the statute. The evidence was clear that the defendant Talerico was present when the victim Sackman paid $350. in cash to the defendant King in part payment for the amount presently due and owing on this loan. In addition, Mr. Talerico went on to tell Mr. Sackman about what had happened to him, Talerico, when he had failed to pay back these same people. Talerico according to the victim Sackman, told Sackman that these same people had placed a gun to his head to force repayment of this loan.

In addition, on November 13, 1972, when the victim Sackman was inquiring as to the source of the loan, or whom he should see to get a further extension of time, the defendant Talerico "let slip" the initials "J.F." The victim Sackman testified that this put fear in his mind, because the initials "J. F." signified Joseph Falcone, a reputed head of organized crime in the Utica area (pp. 287-288).

It is clear, therefore, that this kind of scheme involving frightening of victims cannot succeed without the cooperation of such defendant as the defendant Talerico. The sentencing court took into consideration that he was not a prime mover but a fringe player when it sentenced this defendant. This does not, however, indicate that there was insufficient evidence for the jury to reach its verdict. On the contrary, with all of these activities on the part of the defendant Talerico it is clear that he was a conspirator as well as was guilty of the substantive violation of making the threats against the victim Sackman. The cases concerning this type of operation have affirmed other convictions involving peripheral players in these schemes. See for example, United States v. Briola, 465 F.2d 1018, 1022 (10th Cir. 1972), cert. denied ______ U.S. ______ (1973). United States v. Quintana, 457 F.2d 874 (10th Cir. 1972). In United States v. Zito, 460 F.2d 1401, 1405 (2d Cir. 1972), the kind of threat made by the defendant Talerico to the victim Sackman, that is the slipping of the initials J. F. into the conversation, was held by the Court of Appeals for this circuit to be the kind of threat that was encompassed by the prohibitions of this particular statute. It is submitted therefore that the evidence against the defendant Talerico was overwhelming and although his role in the matter was that of a fringe player, it does not detract from the strength of the evidence against him; rather it goes to it an argument for mitigation of sentence which apparently prevailed in view of the much lesser sentence received by the defendant Talerico from the presiding trial court.

His conviction, however, should be affirmed on the basis that the evidence was sufficient.

Evidence as to Zogby - The defendant Zogby in his brief contends that the evidence was insufficient not so much on the basis that the defendant Zogby was not a conspirator or did not commit the substantive crime, but rather on the basis that it is a question of mistaken identity. It is true that the only eyewitness identification against the defendant Zogby was that of the victim, Mr. Sackman, whose testimony was observed by the trial court and the jury, did not waiver from his identification of the defendant Zogby. In addition, within a week after the October 30th incident for which the defendant Zogby was charged, the victim Sackman made a photographic identification of the defendant Zogby from a large photo box. And, finally, the victim Sackman who, prior to October 30th and prior to the time he had selected the photo from the photo box, had no idea who the black haired man in the back seat of the car on October 30th, was; related to the F. B. I. and in his testimony, a description that matches that of the defendant Zogby's automobile as the automobile in which these two men arrived on October 30th, 1972 (pp. 206-690).

In addition to these factors which go to the corroboration of the victim Sackman's eye-witness identification, the victim Sackman did testify that the defendant Zogby threatened him with a switchblade knife which, in his description, matched exactly that of his description of the knife used by the defendant Carl Mazza on November 18, 1972. It is clear therefore, from all the circumstances that the defendant Zogby was a member of the conspiracy as well as guilty of the substantive crime of threatening Mr. Sackman for the repayment of the loan.

The defendant Zogby in his brief raises certain items of testimony which he alleges are inconsistencies such as the fact that Mr. Sackman in his conversation with Mr. Talerico had said something to the effect that he, Sackman, thought the two men were from Buffalo, not Utica, while in trial he testified that he did not know who they were. In addition, the defendant Zogby's brief argues that the photograph box was labeled local criminals and with that in mind, the defendant Sackman should have clearly known by the time he talked to the defendant Talerico that Zogby was from Utica and not from Buffalo. Whether these are inconsistencies (for example, the photograph box was described not only as local criminals but also "out of town, all types", p. 224), is not a matter of concern for this court which must consider the evidence in the light most favorable to the government at this stage in the proceedings. The jury had an adequate opportunity to consider all the evidence and its verdict clearly rejected the defense arguments of inconsistencies in the identification by the victim Sackman; clearly rejected the defendant Zogby's alibi witnesses apparently agreeing with the government's argument that the alibi witnesses' testimony was too pat and finding it memorized. In any event, it is clear that the evidence was more than sufficient to convict the defendant Zogby.

The Evidence as to the Defendant Mazza - The defendant Mazza argues that the evidence was insufficient to convict him of the conspiracy as well as the substantive count. The evidence is overwhelming as to the substantive count and as a result of that evidence on the substantive count the evidence is clear if not overwhelming that he was a conspirator as well. His defense appears to have been that he did not have knowledge of the September 18, 1972 loan by the defendants Marrone and King to the victim Sackman when, on November 18, 1972, he beat and knifed the victim Sackman demanding that Sackman repay a loan. On his testimony alone he can be convicted for the substantive crime of November 18th, for he did in fact admit that he did go to Mr. Sackman for the purpose of collecting a loan. He denies, however, that the violence he used was for the purpose of collecting that loan but was in self-defense, a defense which the jury below clearly felt was incredible. It can be seen as to the substantive violation that the defendant Mazza did enter Mr. Sackman's automobile, did demand the repayment of the full $6,000, a figure consistent with that loan of September 18, 1972. He demanded it by December 1st. He placed a knife into he neck of the victim Sackman and beat him across the ace, while simultaneously demanding the repayment of this loan. This whole incident was recorded on a ape recording, with the possible exception of the use of he knife. The use of the knife however was corroborted by the testimony of FBI agents who indicated that hey witnessed a newly acquired set of prick marks on Mr. Sackman's neck immediately after the beating and knifing that was recorded on the tape recordings. Mazza, while in the automobile threatening Mr. Sackman went on to say to the defendant King that the defendant King had been unsuccessful in attempting to get the money repaid his way. In addition, it should be noted that the knife used by the defendant Mazza bore a striking resemblance to the knife used by the defendant Zogby and the jury would have been justified in concluding that it was the exact same knife used by both co-conspirators in threatening the victim Sackman. In each of the meetings leading up to the November 18th meeting there were discussions of what would be anticipated on November 18th and who would come to collect the loan of September 18th. On the morning of November 18th the defendant King indicated that "they" have a guy standing by to talk to Sackman about the loan. It is clear, therefore, from all these facts that the defendant Mazza was a conspirator as well as was guilty of the substantive offense of using violence and threats of violence to compel repayment of a loan. Therefore, it is clear that the evidence was overwhelming so that his conviction should be affirmed.

*The Trial Court Properly Charged All Elements of the Crime Set Forth in Count VI With Respect to Defendant-Appellant, Carl J. Mazza* - The defendant-appellant Carl J. Mazza contends in Point IV of his brief that the trial court erred in refusing to charge knowledge of the extension of credit as a necessary element of the crime as requested by counsel, citing *Pettibone* v. *United States,* 148 U.S. 197 (1893); *United States* v. *Rybicki,* 403 F.2d, 599 (6th Cir., 1968); and *Cotton* v. *United States,* 409 F.2d., 1049 (10th Cir., 1969).

In the *Pettibone* case, the Supreme Court held that where a person is charged with obstructing, resisting or opposing any officer of the United States, in serving or attempting to serve process, the indictment must charge knowledge or notice that the officer was such. The *Rybicki* case is substantially similar, holding that the district judge was required to charge that the defendant had knowledge that two persons were government agents engaged in their duties as such. In the *Cotton* case, the charge was sufficient, but the issue concerned sufficiency of the evidence. The court held that with reference to a count of attempting to intimidate a witness there was insufficient evidence to establish that there was a proceeding pending when the witness was threatened.

The *Cotton* case is inapplicable to the present case, since the defendant Mazza does not allege that there was not, in fact, an extension of credit to Sackman at the time in question. The *Pettibone* and *Rybicki* cases are distinguishable on their faces since the trial court charged the jury in the instant case that knowledge was an element of the crime.

The charge in question is as follows:

> " . . . the government must prove to your satisfaction beyond a reasonable doubt each of the following three elements.
>
> "First, that on the dates specified in the counts which you are considering, Sackman still owed principal or interest on a loan or renewal of a loan which had been made to him.
>
> "The second element, did the defendant whom you are considering, actually collect or attempt to collect all or part of the principal or interest still owed on the loan by Sackman, or to punish Sackman for not repaying the loan.
>
> "And the third element is that the defendant whom you are considering knowingly and intentionally used or participated in any way in the use of any extortionate means to collect or to attempt to collect the loan, or to punish Sackman for not repaying the loan." (p. 985-6).

The third element of the charge requires the jury to find that the defendant knew a loan was outstanding in order for it to find that the defendants knowingly and intentionally used extortionate means to collect it. In the cases referred to above, cited by the defendant, the fatal lack of knowledge was that the defendants were not required to know that an essential element of the crime even existed; the courts did not address themselves to whether the defendants had to have knowledge of the specific details of such element. The charge in the instant case meets the tests set forth in the cases cited by the defendant.

Should the defendant-appellant Mazza assert that the trial court was required to charge the jury as to the specific details of the loan as mentioned in the indictment, this contention must fail for lack of prejudice.

The government's proof at the trial showed that the defendant Mazza had knowledge of an extension of credit made by the defendants King and Marrone to Sackman. Mazza sought to prove that he had knowledge only of an extension of credit from Mrs. Marrone, wife of the defendant, Marrone, to Sackman. Even as to this alleged loan, however, the amount due and the due dates were the same as the government proved (pp. 670, 680). Even assuming, *arguendo* that the extension of credit was through Mrs. Marrone, the generally assumed identify of the financial affairs of a husband and wife, coupled with the admitted specific knowledge of other important facts surrounding the extension of credit, are such as to protect the substantive rights of Mazza and avoid any prejudice. See *Berger* v. *United States*, 295 U.S. 78, 55 S.Ct. 629 (1935), where the Supreme Court permitted a variance between the indictment and the proof stating:

> "The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be

> definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial, and (2) that he may be protected against another prosecution for the same offense." (295 U.S. at p. 82).

Under the Berger test, a variance would be permitted in this case to prove exactly that which Mazza admits.

Under the Berger test, Mazza would be convicted if the government had proved the exact loan which he admits. He cannot show any prejudice from the omission of specific details of the loan in the charge to the jury.

While there is adequate specific knowledge of the details of the extension of credit in this case, the courts have gone further in holding that almost no knowledge as to the specifics of the extension of credit would be sufficient for conviction. In United States v. Briola, 465 F.2d, 1018 (10th Cir. 1972), cert. denied, _______ U.S.__________, rehearing denied, _______U.S. __________, the court reviewed a conviction under 18 U.S.C. §§891(7) and 894. The appellant in Briola challenged the sufficiency of the evidence to establish that there even existed an extension of credit within the meaning of the statute. In Briola, one Meyer was employed by a bookmaking operation as a phone man. Meyer apparently placed bets in the name of one Wynn Don. At the time extortionate means were used by the defendant Briola against Meyer, Briola was not aware that Meyer placed these bets on his own. Meyer, at that time, agreed to pay the debt, however. Counsel for Briola argued that Briola never knowingly extended credit to Donald Meyer since Meyer misappropriated money from Briola by placing bets on his own behalf under the code name of "Wynn Don."

The court stated that:

> "[W]e are convinced that the real thrust of the legislation is directed to the use of extortionate means in order to collect moneys which the creditors maintain are owing to them, regardless of whether the loan arose from a traditional type of loan or resulted from the assumption of responsiblity as a result of force or threats." 465 F.2d at 1021.

The court further stated:

> "The record also shows that Meyer was indeed the debtor from the inception of the debt and that Wynn Don was fictitious in this transaction at least ... Also, since Wynn Don was Meyer's customer, he was responsible for payment of the loss. Thus, there existed a basic debt involving an extension of credit within the meaning of the statute." 465 F.2d at 1021.

In the Briola case, the Court looked to whether there was a basic debt owing at the time extortionate means were used by the defendant. This standard is followed by the trial court in the instant case in its charge with respect to Count VI of the indictment.

A-223

## POINT VIII

## THE SENTENCES OF KING AND MAZZA ARE APPROPRIATE AND SHOULD STAND.

Appellants King and Mazza contend that the sentence imposed is excessive and inequitable. The maximum sentence, which can be imposed upon conviction under Section 892 of Title 18 United States Code is $10,000 fine or imprisonment of not more than twenty years or both for each count. The maximum punishment for conviction under Section 894 of Title 18 United States Code is the same. Defendant King was convicted on one count in violation of Section 892, five counts for violation of Section 894, and one count of conspiracy to participate in the use of extortionate means to collect on extention of credit in violation of Section 894, making him liable for up to 140 years imprisonment and a $70,000 fine. Defendant Mazza was convicted on one court of substantive violation of Section 894, and one count of conspiracy under Section 894 which exposed him to a twenty year and $10,000 penalty.

Defendant King claims sentencing of twenty years and $10,000 fine on each count of which he was convicted was excessive. Co-defendant Mazza was sentenced to ten years in prison and claims that was excessive.

The sentence imposed on both defendants was within the statutory limit. It has been uniformly held that the imposition of sentence is within the discretion of the sentencing court, if the sentence is within the statutory limit. United States v. Tucker, 404 U.S. 443 (1972).

In United States v. Velazquez, 482 F.2d 139 (2d Cir. 1973) at 142, the Court of Appeals noted:

> "We are bound by prior case law to the rule that, absent reliance on improper consideration, see U.S. v. Mitchell, 392 F.2d 214, 217 (2d Cir. 1968) (Kaufman J. concurring), or materially incorrect information, see U. S. v. Malcolm, 432 F.2d 809, 816 (2d Cir. 1970), a sentence within the statutory limits is not reviewable."

The same principle was enunciated in United States v. Brown, 479 F.2d 1170, 1172 (2d Cir. 1973). In United States v. McCord, 466 F.2d 17, 18-19 (2d Cir. 1972) the court noted "that a sentence within the statutory limits is generally not subject to review," quoting United States v. Tucker, 404 U.S. 443, 447, 92 S.Ct. 589, 30 L.Ed. 2d 592, 596 (1972).

In Tucker, it was also pointed out that the trial court may exercise wide discretion in the imposition of sentence, and that the trial judge is "largely unlimited as to the kind of information he may consider, or the source from which it may come." id at 404 U.S. 447.

In the case at hand the trial judge neither abused his discretion in the imposition of sentence, nor based the determination of which sentence to impose on misinformation.

Appendix pp. 1095, 1110-1112. There is nothing in the record which would indicate the judge harboring any animus to the defendants King or Mazza. In fact the record indicates the opposite. (1095, 1112). In the case at hand the judge chose to impose concurrent rather than consecutive sentences as to King and substantially less than the statutory limit as to Mazza. The co-defendants Marrone and Dyman (indicted as John Doe) were sentenced by another judge, who presided over two separate and uneventful trials considering this same evidence. Dyman, whose role was the same as that of Mazza, received ten years from that other judge, and Marrone whose involvement was similar to that of Talerico, received the same sentence as Talerico. This would indicate that these sentences were justified on the evidence upon which they were convicted. At the sentencing of Dyman that other District Court Judge noted that King's sentence was appropriate because he was the central figure behind these crimes of violence and extortion for which he was sentenced.

The sentences should stand as imposed by the trial court.

## CONCLUSION

**THE GOVERNMENT-APPELLEE RESPECTFULLY SUBMITS THAT THE CONVICTIONS OF THE DEFENDANTS-APPELLANTS KING, TALERICO, ZOGBY AND MAZZA SHOULD BE AFFIRMED.**

Respectfully submitted,

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A 225

# United States Court of Appeals

FOR THE

## SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth-eighth day of November one thousand nine hundred and seventy-three.

Present: HON. LEONARD P. MOORE,

HON. PAUL R. HAYS,

HON. WILLIAM H. TIMBERS,

Circuit Judges,

United States of America,
Plaintiff-Appellee,
v.
Louis Charles King, Jr., Albert J. Marrone, James Vincent Talerico, Jack Zogby, Carl J. Mazza, John Doe described as a white male in his early 30's with long blonde or dirt Blonde Hair, long Blonde sideburns, clean-shaven round face with a ruddy complexion, narrow squinting eyes, and heavy build with a large stomach, approximately 5'9" to 6' tall.,
Defendants,
Louis Charles King, Jr., Jack Zogby and Carl j. Mazza, Albert J. Marrone, James Vincent Talerico
Defendants-Appellants.

73-1725
73-1726
73-1727

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and [illegible] they hereby are affirmed.

A. DANIEL FUSARO
Clerk

By Vincent A. Carlin,
Chief Deputy Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM 1974

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Docket No. 73-1725

SECOND CIRCUIT COURT OF APPEALS

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LOUIS CHARLES KING, JR.
JAMES VINCENT TALERICO and
CARL J. MAZZA,

Petitioners

against

THE UNITED STATES OF AMERICA

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# PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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December 24, 1973.

## INDEX

| | Page |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Constitutional Provisions Involved | 3 |
| Statement of the Case | 3 |
| Reasons for Granting the Writ | 4 |
| Conclusions | 14 |

## CASE CITATIONS

| | Page |
|---|---|
| U.S. vs. Provoo, 215 F 2d 531 | 5 |
| Kitchen vs. U.S., 221 F 2d 832 | 5 |
| Pullman Co. vs. Hall, 55 F 2d 139 | 5 |
| Carnley vs. U.S., 274 F 2d 68 | 5 |
| Remmer Vs. U.S., 347 U.S. 227 (1954) | 6,8 |
| Baker vs. Hudspeth, 129 F. 2d 782 | 7 |
| U.S. vs. Bonnano, 127 F Supp. 106 (DC N.Y. 1959 | 7 |
| Bollenbach vs. U.S., 66 Sct. 402 (U.S. N.Y. 1946) | 7 |
| Sullivan vs. U.S., 317 F 2d 101 (C.A. Tex. 1966) | 7 |
| Griffen vs. U.S., 295 F. 437 | 8 |
| Mattox vs. U.S., 146 U.S. 140 | 9 |
| Wheaton vs. U.S., 133F. 2d 522 | 9-10 |
| Chambers vs. U.S., 237 F. 513 | 10 |
| Owen vs. McMann, 435 F. 2d 813 (1970) | 10 |
| U.S. vs. Birrell, 276 F. Supp. 798 (DC N.Y. 1967) | 10 |
| Dorman vs. U.S., 435 F. 2, 385 (CA D.C. 1970) | 10 |
| Illinois vs. Allen, 397 U.S. 337, 90 S Ct. 57, 25 L. Ed. 2d 353 1970 | 10 |
| Lewis vs. U.S., 146 U.S. 70, 13 S. Ct. 136, 36 L. Ed. 1011 (1892) | 10 |
| Jones vs. U.S., 299 F. 2d 661 (10th Cir. 1962) | 10 |
| Ware vs. U.S., 376 F. 2d 717 (7th Cir. 1967) | 10 |
| U.S. vs. Grossman, 55 F 2. 408, 410 (E.D. N.Y. 1931) | 13 |
| Becker vs. U.S., 5 F2 45 (2nd Cir.) | 13 |
| Telman vs. U.S., 67 F 2, 716 (10th Cir.) | 13 |
| Tinsley vs. United States, 43 F 2, 890, 892 (8th Cir. 1930) | 13 |
| Fina vs. U.S., 46 F 2d 643 (10th Cir. 1931) | 10 |

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM 1974

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Docket No. 73-1726

[illegible] CIRCUIT COURT OF APPEALS

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LOUIS Charles King, Jr.
JAMES VINCENT [illegible] and
CARL J. MAZZA

Petitioners

against

THE UNITED STATES OF AMERICA

PETITION FOR
A WRIT OF
CERTIORARI
TO THE SUPREME
COURT OF THE
UNITED STATES

---

The petitioners, Louis Charles King, Jr., James Vincent [illegible] and Carl J. Mazza, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals, Second Circuit, rendered in these proceedings on November 28, 1973.

OPINIONS BELOW

The judgment of the United States Court of Appeals, Second Circuit [illegible] (not yet unreported) was without opinion entered [illegible] November 28, 1973. The Second Circuit Court of Appeals affirmed a judgment of conviction rendered after a jury trial [illegible] of the United States Federal District Court for the [illegible] District of New York, which judgment of conviction was [illegible] on June 26, 1973.

## JURISDICTION

The order or judgment of the United States Court of Appeals for the Second Circuit was entered orally on November 28, 1973. This petition for certiorari was filed within thirty days from the date aforesaid. The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

## QUESTIONS PRESENTED

1. Whether or not the trial court erred in not allowing defendant's counsel to attack the credibility of the witness, J. Schuyler Sackman, by showing prior acts of misconduct which directly related to his reputation and character.

2. Whether the trial court erred in not granting defendant's motion to withdraw a juror and for a mistrial based upon possible prejudice of the jury formed as a result of events occurring at the motel where the jury was sequestered.

3. Whether the trial court erred in denying defendant's counsel's motion to voir dire the jury, and, for a new trial based upon jury misconduct after defendant's counsel advised the court that they had received information that the jury had newspapers in its possession, which newspapers could have been highly prejudicial to the defendants.

4. Whether or not the trial court erred in not granting defendant's motion for a mistrial based upon his absence from the trial and his continuance of the trial and subsequent hearings outside of his presence.

5. Whether or not the evidence was insufficient to sustain a jury verdict. That the petitioners willfully and knowingly participated in extortionate means to collect an extension of credit made by defendant Louis Charles King and defendant Albert J. Marrone, as charged in Count VII of the indictment.

6. Counselors for the petitioners join in all arguments briefed by counsel for other petitioners wherever pertinent or applicable.

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the Constitution of the United States states as follows: "No person shall be held to answer for a capital, or otherwise infamous crime...nor be deprived of life, liberty or property without due process of law..."

The Sixth Amendment of the Constitution of the United States states as follows: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The Fourteenth Amendment of the Constitution of the United States states as follows: "...nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws..."

## HISTORY OF THE CASE

On the 7th day of December, 1972, the above-named petitioners, were indicted by the Grand Jury, criminal no. 73-CR-9.

The petitioner, Louis Charles King, Jr., was charged with counts I through VII of said indictment. The petitioner, Carl J. Mazza, was charged with count VI and VII of the said indictment. The petitioner, James Vincent Talerico, was charged with counts IV and VII of the said indictment.

The case came on for trial on February 20, 1973, in the United States Court House, in Utica, New York, before the Honorable Lloyd F. McMahon, United States District Judge, and a jury. The matter was tried and on the 28th day of February, 1973, the jury returned verdicts of guilty against each of the petitioners on each and every count for which they were charged in the indictment. The petitioner, Carl J. Mazza, was sentenced on March 23, 1973, to a term of ten years. The petitioner, James Vincent Talerico, was sentenced at the same time to a term of forty years and a Ten Thousand Dollar fine on each count for which he was found guilty but was thereafter resentenced to a term of seven years, for which sentence he is now serving. The petitioner, Louis Charles King, Jr., was sentenced on May 25, 1973, to a term of twenty years and a Ten Thousand Dollar fine on each count to run concurrently.

A Notice of Appeal was filed on behalf of the petitioner, Carl J. Mazza, on March 23, 1973. A Notice of Appeal was filed for the petitioner, James Vincent Talerico, on the 23rd day of March, 1973. A Notice of Appeal was filed on behalf of the petitioner, Louis Charles King, Jr., on May 25, 1973.

## STATEMENT OF FACTS

Attached hereto and made a part hereof and marked and designated "Exhibit A", is a Statement of Facts as they pertain to the petitioner, Louis Charles King, Jr.

Attached hereto and made a part hereof and marked and designated "Exhibit B and C" is a statement of facts as they pertain to the petitioner, Carl J. Mazza, and the petitioner, James Vincent Talerico.

## REASONS FOR GRANTING THE WRIT

### 1. THE TRIAL COURT ERRED IN NOT ALLOWING DEFENDANT'S COUNSEL TO ATTACK THE CREDIBILITY OF THE WITNESS, J. SCHUYLER SACKMAN, BY SHOWING PRIOR ACTS OF MISCONDUCT WHICH DIRECTLY RELATED TO HIS REPUTATION AND CHARACTER.

Starting with the opening statement of counsel, the Trial Court had advised that he would not allow defense counsel to examine the witness, Sackman, concerning any previous acts of misconduct. The Court indicated that the witness could only be impeached by prior convictions and that defense counsel could not attack the credibility of the witness by showing prior acts of misconduct which related to the reputation and character of the Government's chief witness.

The Court stated that it relied upon U.S. vs. Provoo, 215 F 2d 531. The Court in Provoo stated that "Defendant taking the witness stand subjects himself to cross-examination; within limits of appropriate rules of evidence, like any other witness, for the purpose of impeaching his credibility, specific acts of misconduct by him, not resulting in his conviction of a felony or crime of moral turpitude, are not proper subjects of cross-examination for such purposes." While this case is correct, it does not apply to the instant case because Sackman was not a defendant but rather a mere witness and his credibility could have been impeached by attacking his reputation for veracity. The reason for the Provoo case is to prevent prejudice to defendant, but that reason is inapplicable to impeaching a witness.

In Kitchen vs. U.S., 221F 2d 832, it was stated, "Qu4stions upon collateral issues for impeachment purposes on cross-examination are permissible when the subject matter of the question bears directly upon the voracity of the witness in respect to the issue involved."

In Pullman Co. vs. Hall, 55F 2d 139, it was held that for purposes of impeaching credibility, witnesses may be questioned as to misconduct respecting collateral matters, which have a tendency to show lack of honesty or truthfulness.

Proof of a witness' reputation for truth and voracity is admitted where there is a question whether a witness had testified truthfully (Carnley vs. U.S., 274F 2d 68).

See also Federal Jury Practice and Instructions, Vol. 2, by Devitt-Blackmar, Section 72.09, at page 151, entitled Effect of Prior Inconsistent Statements or Conduct-By a Witness Not a Party-By a Party, as follows: "Evidence that at some other time, a witness, not a party to this action, has said or done something which is inconsistent with the witness' testimony at the trial, may be considered for the sole purpose of judging credibility of the witness; but may never be considered as evidence or proof of the truth of any such statement.

## 2. THE COURT ERRED IN NOT GRANTING DEFENDANT'S MOTION TO WITHDRAW A JUROR AND FOR A MISTRIAL BASED UPON POSSIBLE PREJUDICE OF THE JURY FORMED AS A RESULT OF EVENTS OCCURRING AT THE MOTEL WHERE THE JURY WAS SEQUESTERED.

On the night of February 24, 1973, while the jury was sequestered at the Ramada Inn Motel, pursuant to the Order of the Trial Court, the defendant, Louis Charles King, Jr., allegedly attempted to assault an F. B. I. agent by throwing a grenade into the agent's house. A chase followed which concluded with a shoot-out in the parking lot at the Ramada Inn Motel where the jury was sequestered.

It is difficult to believe that such an event would go unnoticed by the occupants of this motel and would not be discussed among them. It is further difficult to believe that such an event would not in some way come to the attention of the jury so as to influence their impartiality towards the defendant, King. This would especially be true in view of the fact that upon the continuation of the trial the following Monday, the defendant, Louis Charles King, Jr., was absent from his seat next to his attorney. Not only was the defendant absent, but when Court reconvened, the hallway leading to the jury room and court room was filled with United States Marshals and electronic detecting devices, which were manned by armed guards, without any explanation by the Court had a detrimental and prejudicial effect on the defendant.

It is submitted that in view of the possibility that prejudice could have resuled in the jury's minds as a result of the foregoing incident, that the Court had the duty upon a motion such as was made by defendant's counsel, to investigate and determine whether or not the incident complained of was harmful to the defendants. See Remmer vs. U.S., 347 U.S. 227(1954).

No such investigation or determination was conducted by the Trial Court.

In the case of Baker vs. Hudspeth, 129 F. 2d 782, it was stated that "Where it is made to appear that a jury sworn to try a case is subjected or exposed to any matter or thing that might tend to prejudice or influence their consideration of the case or that the behavior of any member of the jury is unbecoming to a gentleman of the jury, a presumption arises against impartiality and that presumption can be rebutted only by a clear and positive showing that such matter did not influence the verdict."

It is submitted that a presumption of impartiality clearly arose as a result of the incident which occurred at the Ramada Inn, which presumption was never rebutted. See also United States vs. Bonnano, 127 F Supp. 106 (DC N.Y. 1959); reversed on different grounds; Bollenbach vs. U.S., 66 Sct. 402 (U.S. N.Y. 1946); Sullivan vs. U.S., 317 F 2d 101 (C.A. Tex. 1966)

### 3. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S COUNSEL MOTION TO VOIR DIRE THE JURY AND, FOR A NEW TRIAL BASED UPON JURY MISCONDUCT AFTER DEFENSE COUNSEL ADVISED THE COURT THAT HE HAD RECEIVED INFORMATION THAT THE JURY HAD NEWSPAPERS IN ITS POSSESSION, WHICH NEWSPAPERS COULD HAVE BEEN HIGHLY PREJUDICIAL TO THE DEFENDANT.

The defendant's attorney made a motion to voir dire the jury (transcript, P. 743). As was indicated at the time the motion was made, counsel for defendant, King, was advised by counsel for co-defendant, Marrone, that the jury had newspapers in its possession, which newspapers had to be confiscated by the United States Marshal's office. Defendant King's counsel was advised by the attorney for Marrone, that he had been so informed by members of the United States Marshal's office. This was related to the Court.

In a similar case entitled, Griffen vs. U.S., 295 F. 437, the Circuit Court of Appeals, decided on February 17, 1924, members of the jury were seen reading newspapers in which was published an article very prejudicial to the defendant. Defendant's counsel made a motion for a new trial based upon the misconduct of the jury in reading these articles, but the motionw were denied. Judgment was reversed and a new trial ordered. The Court reasoned "It is the right of a defendant accused of a crime to have nothing reach the mind of the jury during the case except strictly legal evidence admitted according to law and if facts prejudicial to him reach the jury otherwise, it is the duty of the trial Judge to Withdraw a juror and grant a new trial.".

In the instant case, defense counsel sought to have the Court investigate the fact that the jury had in its possession copies of the local newspapers which contained flagrantly prejudicial articles concerning the defendant, together with unmistakable headlines concerning certain events, which, if known to the jury would have been severely prejudicial. Defendant's counsel not only made a motion for a mistrial, but also a motion to voir dire the jury and a motion for a new trial. The trial Judge not only denied the defendant's counsel's motion but also stated he would make no efforts to investigate the matters in open court nor would he consider this point in the future. He indicated that he was assured by the Marshals that nothing prejudicial had come into the hands of the jury.

It is submitted that the Court should have required at the very minimum, a hearing in which to determine whether any prejudice existed in the minds of the jury with respect to the defendant as a result of reading any newspapers containing prejudicial statements or articles. This Court did not and it is submitted that this is prejudicial error.

The Court's attention is further directed to the case of Remmer vs. U.S., 347 U.S. 227 (1954). In this case, it was brought to the Court's attention that the jury was the recipient of certain unwarranted communications. The F.B.I. was requested to investigate which they did, after which the prosecuting attorney, and the trial court Judge considered their findings. A motion was made by the defense for a new trial which was denied. The judgment was vacated and the case remanded for a hearing to determine whether the incident complained of was harmful to the petitioners. The Court citing *Mattox* vs. *U.S.*, 146 U.S. 140 and *Wheaton* vs. *U.S.*, 133 F. 2d 522, stated that in a criminal case, any private communication, contact or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the Court and the instructions and directions of the Court made during the trial, with full knowledge of the parties. The presumption is not conclusive but the burden rests heavily upon the Government to establish after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

In the instant case, the defendant's counsel brought to the Court's attention that jury misconduct had occurred. The Trial Court thereupon sought the assistance of the United States Marshal and without any notice to or hearing of the defendant summarily and with no hearing in the matter, denied defendant's counsel motion for a mistrial, together with a denial of the motion to voir dire the jury and for a new trial.

The Court in *Remmer* goes on to say, "The Trial Court should not decide to take final action ex parte on information such as was received in this case but should determine the circumstances, the impact thereof upon the juror and whether or not it was prejudicial in a hearing with all interested parties permitted to participate.

Defense, in the instant case was granted no such opportunity.

It should also be pointed out that upon remand of the above-cited case a hearing was conducted at the end of which the District Court ordered that no harmful prejudice had resulted from the jury contact complained of, Upon appeal of that ruling, the Supreme Court in 350 U.S., 377, reversed upon the record and ordered a new trial.

The Court stated that the District Court did not go far enough into an investigation of possible prejudice from the jury conduct complained of, but that there was enough to see that there was indeed prejudice existing. The Court stated as its holding, "We hold that on a consideration of all the evidence uninfluenced by the District Court's narrow construction of the incident complained of, the petitioner is entitled to a new trial.".

Other cases in support of the foregoing are as follows: Chambers vs. U.S., 237 F. 513; Wheaton vs. U.S., 133 F. 2d. 522; Owen vs. McMann, 435 F. 2d 813 (1970). See also, U.S. vs. Birrell, 276 F. Supp. 798 (DC N.Y. 1967); Dorman vs. U.S., 435 F. 2, 385 (CA D.C. 1970).

### 4. THE TRIAL COURT ERRED IN NOT GRANTING DEFENDANT'S MOTION FOR A MISTRIAL BASED UPON HIS ABSENCE FROM THE TRIAL AND ITS CONTINUATION OF THE TRIAL AND SUBSEQUENT HEARINGS OUTSIDE OF HIS PRESENCE.

One of the most basic of the rights guaranteed by the Confrontation Clause of the Sixth Amendment is the accused's right to be present at every stage of the trial. Illinois vs. Allen, 397 U.S. 337, 90 S Ct. 57, 25 L Ed. 2d 353(1970); Lewis vs. U.S., 146 U.S. 70, 13 S. Ct. 136, 36 L. Ed. 1011 (1892).

Since the absence of a criminal defendant during the course of proceedings which are critical to the trial process carries Constitutional overtones, appellant is under no burden to show actual prejudice for it will be presumed. Jones vs. U.S., 299 F. 2d 661 (10th Cir. 1962); Fina vs. U.S., 46F. 2d 643 (10th Cir. 1931). However, as was stated in Jones vs. U.S., Supra, "We can let stand no conviction where the defendant was not present at sll stages of the proceedings unless the record completely negatives any reasonable possibility of prejudice arising from such error." See also Ware vs. U.S., 376 F. 2d 717 (7th Cir. 1967)

The defendant-appellant should have been present during in camera proceedings regarding his voluntary absence from the trial.

The Constitution does not require the Court to discontinue a trial once commenced if the defendant has voluntarily absented himself. Federal Rules of Criminal Procedure, Rule 43 and Advisory Committee Note 2; see Illinois vs. Allen, #(& U.S. 337, 90 S. Ct. 1057, 1060.

Although we cannot presume the waiver of Constitutional rights, Johnson vs. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938).

The Trial Court should have at least conducted a full hearing in the presence of the defendan t to determine whether or not his absence from the trial was voluntary. Defense Counsel wanted defendant present so that he could be assisted by the defendant during the hearing and to present any evidence that the defendant would have to offer concerning his voluntary absence during the course of the trial.

The Confrontation Clause of the Sixth Amendment to the Constitution provides that: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him..." The Supreme Court has held that the Fourteenth Amendment makes the guarantees of this clause obligatory upon the states. Pointer vs. Texas, 380 U.S. 400 (1965). One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the court room at every stage of his trial. Lewis vs. U.S., 146 U.S. 370 (1892).

In the U.S. vs. Tortora, 464 F. 2d 1202 (1972), it was stated, "Like any Constitutional guarantee, the defendant's right to be present at trial may be waived." Snyder vs. Massachusetts, 291 U.S. 97, 106, even if that waiver is implied from the defendant's conduct, Illinois vs. Allen, Supra. The Supreme Court long held that a defendant who knowingly absents himself from the court room during trial "leaves the Court free to proceed with trial in like manner and with like effect as if he were present." Diaz vs. U.S., 223 U.S. 442, 445 (1912)...waiver of a Constitution right must be "knowingly" and "voluntary"...

Having received actual notice when trial proceedingings will take place, in the absence of some compelling excuse, the defendant cannot obstruct the course of justice by absenting himself from the process, cf. Illinois vs. Allen, Supra.

In the instant case the defendant was shot by members of the Federal Bureau of Investigation or the State Police. He was in a hospital in the same area in which the trial was being conducted and the trial could have proceeded in his presence at the hospital. He was rational and facilities were provided to take his testimony at the hospital, which facilities were large enough to accommodate the judge, jury, defendants and their attorneys, prosecuting attorneys, press and thirty or more spectators.

The defendant was not present at the hearing to determine voluntariness and he could not give his side of the story. He could not participate with his attorney in his defense as was stated in Court (Transcript, P. 1069) "Mr. Brindisi: I don't have his assitance to participate in the conduct of his hearing."

. . .

The Court: "You can tell him about what occurred. We will proceed."

The rights of the defendant under the due process clauses of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment have also been violated by the Court's conduct in continuing the trial in the absence of the defendant.

## 5. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A JURY VERDICT THAT PETITIONERS WERE PARTICIPANTS IN THE CONSPIRACY CHARGED IN COUNT VII OF THE INDICTMENT

The elements of a criminal conspiracy were well stated by Judge Moscowitz:

"The elements of a criminal conspiracy are:

> First, an object to be accomplished; second, a plan or scheme embodying means to accomplish that object; third, an agreement or an understanding between two or more of the defendants whereby they become definitely committed to cooperate for the accomplishment of the object by the means embodied in the agreement, or by any effectuate means; and lastly, an overt act."
>
> U.S. vs. Grossman, 55 F 2. 408, 410 (E.D. N.Y. 1931)

Of these elements, the key word is agreement. Without this important agreement or meeting of the minds, there can be no conspiracy.

Judge Learned Hand coined the keynote phrase:

> "Under a charge of conspiracy, the graveman of the crime is the formation of the agreement."
>
> Becker v. U.S., 5 F2 45 (2nd Cir.) cert. denied 267 U.S. 602 (1924) at 49

To constitute a conspiracy, the agreement need not be a formal contract agreement, as the criminal mind does not operate in that fashion. However, despite the informal nature a conspiracy agreement may take, the prosecution must nevertheless prove:

> "That the minds of the parties met in an understanding way so as to bring about an intelligent and deliberate agreement to do the act, or acts charged..."
>
> Telman v. U.S., 67 F 2, 716 (10th Cir.) cert. denied 292 U.S. 650 (1933)

The prosecution must prove some unity of purpose, some common design or understanding to determine that words and action are employed to a common goal,

> Tinsley v. United States, 43 F 2, 890, 892 (8th Cir. 1930).

A 241

## CONCLUSIONS

For these reasons, a ~~write~~ writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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## STATEMENT OF FACTS

On the 20th day of February, 1973, this case was called to trial and prior to the selection of the jury a motion was made on behalf of the defendants for a hearing to determine whether or not a co-defendant, Albert Marrone, was an informer and whether or not he had divulged the defense of the remaining defendants to the prosecution. (Transcript, P. 4-8)

A hearing was conducted and it was learned that the defendant, Albert Marrone, did in fact discuss some aspects of the defense with members of the Federal Bureau of Investigation and the Attorney General's Office.(Transcript, P. 9-116) This motion was denied. (Transcript P. 116) The motion was renewed at the end of the trial.(Transcript, P. 1043-1044) The motion was again denied. (Transcript, P. 1047-1050)

Defendant King's Attorney, in his opening statement tried to tell the jury what he expected to prove concerning the reputation and character of the prosecution's chief witness. (Transcript, P. 169-172) The Trial Court interrupted the opening statement and called Defense Counsel to the bench and informed him that this type of proof would be inadmissible. (Transcript, P. 172-173)

"EXHIBIT A"

The Government's chief witness, J. Schuyler Sackman, testified that he was an insurance agent and mortgage broker. (Transcript, P. 189) That he knew the defendant, Louis Charles King, for approximately two years, (Transcript, P. 191), and that he borrowed $4,000.00 from defendants, King and Marrone (Transcript, P. 193) and that King said the loan was for $5,000.00 and that there was interest of $1,000.00 on the $4,000.00 loan. (Transcript, P. 195) He testified that he was told if he did not pay the money back he would be in trouble, (Transcript, P. 197) that he took the money back to Syracuse, N. Y., copied the serial numbers on an envelope and gave that envelope to a member of the Federal Bureau of Investigation. (Transcript, P. 197-198) He also testified that at the time he borrowed the money he was an informer for the Federal Bureau of Investigation. (Transcript, P. 259). That he had become an informer in August, 1972 (Transcript, P. 326) and that he had been informing on some of the defendants in this action prior to the loan.

He stated that he borrowed the money because he desperately needed it and he informed the Federal Bureau of Investigation that he was going to borrow the money. (Transcript, P. 332) He used the money to pay his personal bills. (Transcript, P. 340) The Federal Bureau of Investigation did not

"EXHIBIT A"

tell him to return the money he borrowed. (Transcript, P. 341) He never told the F.B.I. that he thought violence would be caused to him. (Transcript, P, 342) He met with the F.B.I. daily, (Transcript, P. 343) and he received no threats in earlier conversations. (Transcript, P. 344)

An offer of proof was made in regards to illegal business transactions of J. Schuyler Sackman. (Transcript, P. 352-356) The Court would not allow Defense Counsel to cross-examine on matters which would have affected the character and reputation of Sackman.

Sackman informed the F.B.I. on the day of the alleged crime that he had been shylocked, (Transcript, P. 361) He also told the F.B.I. that he would not have to pay the money back if the deal in Panama went through. (Transcript, P. 364) The Federal Bureau of Investigation knew that there was a deadline and they would not get the money for him. (Transcript, P, 368) He thought that the defendants would be arrested prior to the time that the loan was due, (Transcript, P. 370)

On February 26, 1973, a motion was made for the withdrawal of a juror and a mistrial as a result of an incident occuring on February 24, 1973, involving the defendant, Louis Charles King, Jr. The defendant was shot by members of the Federal

"EXHIBIT A"

Bureau of Investigation or members of the State Police arising out of a grenade-throwing incident at the home of Louis Kelly, a Special Agent of the Federal Bureau of Investigation. The Court denied this motion and ruled that the defendant King had voluntarily absented himself from the trial and that the trial would continue without his being present. A motion was also made at that time to voir dire the jury to determine whether they knew of the incident since it occurred at the Ramada Inn where they were sequestered. The Court denied the motion on the grounds that he had (The Court) discussed this matter with the Marshals and was assured that the jury did not know of the incident. A further motion was made to continue the trial at the hospital in the defendant King's presence, which was also denied. The Court was also informed that the defendant King wished to testify. The trial continued without any explanation to the jury (Transcript, P. 658-664) regarding the absence of the defendant, King.

Thereafter another motion was made to continue the trial in the presence of the defendant, King, and the Court was informed that there were facilities available at the hospital. (Transcript, P. 743) Another motion was made to voir dire the jury after Defense Counsel were informed that all of the jurors activities had been cancelled on the day of the incident and that newspapers had been received by the jury, which newspapers were confiscated by the Marshalls. These motions were again denied. (Transcript, P. 744-745)

At the hospital and before the defendant King testified, the doctor indicated that King was rational and had been rational since the morning of his injury (transcript, p. 826) and that he was quite anxious to testify. (Transcript, P. 828)

King testified and the Court instructed the jury "Suffice it to say over the weekend he was injured." (Transcript, P. 859)

The Court was requested after the defendant King testified to continue the trial at the hospital, which request was denied. (Transcript, P. 860)

After the trial was completed and the defendant found guilty a motion for judgment of acquital and for a new trial was made. These motions were denied. A hearing was ordered by the Court to determine the voluntariness of the defendant King's absence from the trial, and a request was made that a hearing be held in the presence of the defendant, King. This was denied. Defendant's counsel then withdrew his motion for a hearing and this was also denied by the Court. (Transcript, P. 1043-1072) Counsel for defendant, King, did not participate in the hearing. (Transcript, P. 1073) The Court, after the hearing, ruled that the defendant had knowingly and voluntarily absented himself from the trial. (Transcript, P. 1074-1087)

The defendant was sentenced on May 25, 1973 to twenty years and fines of $10,000.00 on each count, to run concurrently with each other. (Transcript, P. 1112)

## STATEMENT OF FACTS

At the trial, the Government's chief witness, J. Schuyler Sackman, gave testimony that on or about September 18, 1972, he borrowed $4,000. from defendants Louis Charles King and Albert J. Marrone, and he physically took the money from Albert J. Marrone (A3a); that the transaction occurred at the Ramada Inn in Utica, New York. The purpose of the loan was to enable J. Schuyler Sackman to pay off some personal obligations. He testified that the terms of the loan were as follows: that he had to

"EXHIBIT B & C" A 249

pay $1,000. Interest for one month, plus the $4,000. (A4a); and that he was made to understand that he had better repay the loan. The money was handed over to him in a white envelope and it was in $100. bill denominations (A5a). J. Schuyler Sackman testified that he returned to Syracuse after the aforesaid meeting, marked down the serial numbers of each of the bills in the white envelope. He subsequently turned over the said envelope to the F.B.I. (A6a), for whom he testified he was working as an informant before the 18th of September, 1972, (A7a); gave testimony concerning his acquaintance with the defendant King, and Talarico, and said that he had prior dealings with defendant King over loans. He went on to testify that on October 30, 1972, he had met with King regarding the repayment of the loan, which was past due, and that he informed King that he could not get all of the money to repay said loan, and requested a meeting with the representatives of the people who made the loan for the purpose of securing additional time to pay. That on that day, he claims he met with King at the parking lot at Howard Johnson's Restaurant in North Utica, and that two men, one of whom he identified as the defendant Zogby, talked with him and threatened him with a gun and knife for the repayment of this loan.

J. Schuyler Sackman testified that on November 11, 1972, he telephone James Vincent Talarico and arranged a meeting with him at Geraci's Restaurant in Utica.

The conversation over the telephone was recorded by

J. Schuyler Sackman by means of electronic tape recorder placed on on his body. He met defendant James Vincent Talarico that afternoon at Geraci's Restaurant and the principal purpose of the meeting was to discuss other business matters that he had with defendants Talarico and King, not pertaining to this loan.

During the course of the conversation, J. Schuyler Sackman asked defendant Talarico for some help (A8a). He described two people, who had met and threatened him on the 30th of October, and asked defendant Talarico if he knew who they were, to which defendant Talarico replied: "punks". (A8a). Also, during the course of the conversation, he indicated to defendant Talarico that he had an obligation to meet with King on Monday the 13th. This was a statement that J. Schuyler Sackman made with the solicitation from defendant James Vincent Talarico.

On the morning of the 13th of November at 11:30 A.M., J. Schuyler Sackman met with defendant Louis Charles King at the Whitesboro Auto Shop at Yorkville, New York, at which time James Vincent Talarico was present. J. Schuyler Sackman stated he took the sum of $350. from his wallet and gave it to King (A9a). King was disturbed and angry, and told him that was not enough, and that he should get the rest of the money quickly. J. Schuyler Sackman testified that defendant Talarico unsolicitated entered the conversation and told him that he had once borrowed $500. from that fellow (A10a, A11a), and that they put a gun to his head and threatened him. The entire conversations on the 13th of November, 1972, were not recorded electronically by J. Schuyler Sackman.

J. Schuyler Sackman went on to testify that on the 13th of November 1972, in the parking lot of Howard Johnson's Restaurant, he met with King and was threatened by defendant, Carl J. Mazza, over the repayment of the loan. (A12a) The entire conversation was recorded on tapes,

Carl J. Mazza, in his direct testimony, testified that he had asked Louis Charles King to arrange a meeting with J. Schuyler Sackman in order that he may ask repayment of money due and owing to Elizabeth Marrone, to aid her in support and maintenance of herself and her child. (A13a-A30a)

He further testified that any violence that took place at this meeting with J. Schuyler Sackman was impromptu and out of fear for himself.

Lastly, Carl J. Mazza testified that he never was aware of any loan made to J, Schuyler Sackman by Louis Charles King and Albert J. Marrone on September 18, 1972; and that he had never conspired, confederated or agreed with any of the other defendants to collect an extension of credit made to J, Schuyler Sackman (A29a),

The testimony of the co-defendant-appellants attest to the fact that no conspiracy or agreement was ever entered into with defendant-appellant, Carl J. Mazza, to collect an extension of credit made to J. Schuyler Sackman. (A54a,A55a,A56a)

The prosecution offered no evidence controverting the denial of knowledge of a loan or conspiracy to collect the loan, or even to controvert the samaritan act on the part of defendant-appellant, Carl J. Mazza.

Following the close of the Government's case, a motion was made on behalf of defendant-appellant, Carl J. Mazza, pursuant to Rule 29A for a judgment of acquittal, on the grounds that the evidence produced by the Government is insufficient to establish a prima facie case, and that it was insufficient as a matter of law, from which a reasonable person can conclude the involvement of defendant-appellant, Carl J. Mazza, in the commission of the criminal acts charged. (A31a, A32a)

During the course of trial, Court adjourned February 23, 1973 at 5:00 P.M. on that day, with no extraordinary events occurring, fully intending to resume proceedings on the following Monday.

In the evening of February 24, 1973, an incident occurred involving the co-defendant-appellant, Louis Charles King, which completely damaged the entire atmosphere of normality in the trial at hand prior to its adjournment on February 23, 1973. (A33a-A38a)

Co-defendant-appellant, Louis Charles King, allegedly had attempted to commit felonious assault on a Federal officer, Lewis Kelly, by throwing a hand grenade into his home on Tallcott Road located in Utica, New York. (A39a, A40a). A chain of events had followed this incident resulting in the shooting of Louis Charles King by Federal officers necessitating his hospitalization.

This incident occurred at the parking lot of the Ramada Inn, which was the motel where the sequestered jury was housed, and later learned. Considerable publicity, radio and T.V. commentaries were made periodically on the hour concerning this incident.

Upon the presiding Justice Hon. Lloyd F. MacMahon being advised of the above incident, he immediately revoked bail on all other co-appellants and had them immediately incarcerated, without an iota of evidence of any involvement of any of them.

Court reconvened Monday, February 26, 1973, in an atmosphere totally remote from that during the previous Friday.

In the hallway to the Courtroom and to the jury room was set up electronic detecting devices which all persons were required to pass. Presumably this device was only made operative when spectators were to enter the Courtroom and was not operative as relating to the jurors and Court personnel.

The appearance of the device more than halfway through the trial with no explanation from the Court, and combined with the following, had to create some affect on the jury.

Upon entering the Courtroom at the Judge's direction prior to the continuation of the trial, noticeable changes were existent as follows:

(a) The absence of defendant Louis Charles King from the Courtroom and the continuation of the trial against him without his presence.

(b) A largely increased number of U.S. Marshalls and F.B.I. agents standing and seated at strategic areas of the

Courtroom for protection of the Court, the presiding Justice, the jurors, the witnesses and the attorneys, and also strategically placed to guard over the co-defendants; all of whom were absent the prior week of trial.

Trial continued throughout the day of Monday, February 26, 1973.

On Tuesday, February 27, 1973, Court was reconvened at St. Luke's Memorial Hospital located in New Hartford, New York, in a hospital auditorium set up specifically for this purpose of trial. (A41a) / The jurors were brought from their motel directly to the hospital under full added protection of U.S. Marshalls.

The witness to testify was co-defendant Louis Charles King from his hospital bed which was rolled in front of the twelve jurors.

Defendant, Louis Carlos King, was lying prone on his back with plasma tubes in his arms and tubes entering his nostril. He was audible only through the use of a microphone placed close to his lips. (A42 a)

This condition of defendant Louis Charles King was explained to the jurors by the Court as follows (A43 a):

> "........nor are you to speculate about Mr. King being here. Suffice it to say, over the weekend he was injured."

Court then adjourned and resumed at 2:00 P.M. that afternoon in the Courthouse in Utica, New York.

All during the week of trial the co-defendants were brought to and from the Courtroom in chains and surrounded by U.S. Marshalls.

On the Monday morning prior to commencement of trial, all attorneys moved the Court to withdraw a juror and a mistrial (A34a), because of the above mentioned occurrences and change of events; particularly because of the prejudice created against the respective defendants.

The Court denied this motion as to defendant Louis Charles King because he voluntarily absented himself from the trial. This ruling, however, can in no way apply to the co-defendants; however the Court still denied this motion.

The attorneys then moved to have the Court voir dire the jury to determine whether or not they obtained any knowledge of the weekend incident. The Court also denied this motion upon assurances made to it by the U.S. Marshalls with no further inquiry or investigation. (A36a)

At the conclusion of the entire trial, the Court directed the jurors not to speak to anyone concerning this case. If anyone tried to contact them or talk to them, they are to contact the F.B.I. immediately. (A1a)

This direction of the Court in effect precluded the attorneys from contacting or speaking with the jurors concerning their knowledge of the incident involving Louis Charles King, under penalty of contempt.

"EXHIBIT B & C"

(NORTHERN DISTRICT)
DC DOCKET 73CR9
CA DOCKET 73-1725

# Supreme Court of the United States

No. 73-5991

Louis Charles King, Jr., et al.,

Petitioners,

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Second ------------- Circuit.

ON CONSIDERATION of the petition for a writ of certiorari herein to the United States Court of Appeals for the Second ------------ Circuit, it is ordered by this Court that the said petition be, and the same is hereby, denied.

April 22, 1974

A true copy MICHAEL RODAK, JR.
Test:
Clerk of the Supreme Court of the United States
By
Deputy

U.S. DISTRICT COURT
N.D. OF N.Y.
FILED
APR 9 - 1975

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

Louis Charles King, Jr., Albert J. Marrone, James Vincent Talerico, Jack Zogby, Carl J. Mazza, John Doe, described as a white male in his early 30's with long blonde or dirty blonde hari, long blonde sideburns, clean-shaven round face with a ruddy complexion, narrow squinting eyes and hearty build with a large stomach, approximately 5'9" to 6' tall

Indictment # 73-CR-94

SIR:

PLEASE TAKE NOTICE, that upon the annexed affirmations of Louis T. Brindisi, Esq., John Longeretta, Esq., and Joseph Manganelli, Esq., duly affirmed on the 7th day of March, 1975, attached hereto and made a part hereof, and upon the Indictment and all the pleadings and proceedings heretofore had herein, the undersigned will move this Court at the Federal District Court in the Federal Building in the City of Utica, New York, on the day of , 1975, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an Order, pursuant to Title 28 of the United States Code Section 2255 setting aside and vacating the sentence heretofore imposed upon the defendants, Louis Charles King, Jr., James Vincent Talerico, Jack Zogby, Carl J.

Mazza, on the grounds that the sentence imposed was in violation of the Constitutional rights of these defendants in that they were not given a fair trial pursuant to the rights guaranteed to them by the Sixth Amendment to the Constitution of the United States and were further deprived of the equal protection of laws as guaranteed to them by the Fourteenth Amendment of the Constitution of the United States and further that they were denied due process of law as guaranteed to them under the Fifth Amendment of the Constitution of the United States and the defendants further move for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure on the grounds that a new trial is required in the interest of justice or in the alternative for a hearing to determine whether or not there should be a voir dire of the trial jury and for such other and further relief as the Court may seem just and proper.

[illegible]

Dated: March 31, 1975, at
Utica, New York.

Yours etc.,

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

* * * * * * * * * * * * * * * * * * * * * * * * * * * *

UNITED STATES OF AMERICA

vs.

Louis Charles King, Jr., Albert J. Marrone, James Vincent Talerico, Jack Zogby, Carl J. Mazza, John Doe, described as a white male in his early 30's with long blonde or dirty blonde hair, long blonde sideburns, cleanshaven round face with a ruddy complexion, narrow squinting eyes and hearty build with a large stomach, approximately 5'9" to 6' tall

* * * * * * * * * * * * * * * * * * * * * * * * * * * *

AFFIRMATION OF ATTORNEYS

The undersigned attorneys, for themselves and under the penalties of perjury, affirm the following statements are true except as to those statements made by way of information and belief:

1. That the said Joseph T. Manganelli, was at all times hereinafter mentioned, the attorney for the defendant, James Vincent Talerico; that the said John A. Longeretta, was, at all times hereinafter mentioned, the attorney for the defendant, Carl J. Mazza; and that the said Louis T. Brindisi, was at all times hereinafter mentioned, the attorney for the defendant, Louis Charles King, Jr.

2. That each of the defendants, Louis Charles King Jr., James Vincent Talerico, Jack Zogby and Carl J. Mazza, were convicted by a jury in the District Court for the Northern District of New York and after

conviction were sentenced by Hon. Lloyd F. McMann, United States District Court Judge to a term in a Federal Penitentiary and that as a result of said sentence each of these defendants are presently serving their sentence and are in custody at the Federal Prison in Lewisburg, Pennsylvania.

3. That following the conviction of the above-named defendants, on February 29, 1973, your affirmants, by Order of Judge Lloyd F. McMann, United States District Court Judge were prohibited from discussing the case with the jury who sat in judgement.

4. That on the [illegible] day of March, 1973, the defendants, James Vincent Talerico, Jack Zogby and Carl J. Mazza, were sentenced to a term of imprisonment by Hon. Lloyd F. McMann, United States District Court Judge.

5. That the defendant, Louis Charles King, Jr., was sentenced by Hon. Lloyd F. McMann, United States District Court Judge on the 25th day of May, 1973.

6. That during the course of the trial, it came to the knowledge of your affirmants that the jury was sequestered at the Ramada Inn situate on Burrstone Road, New Hartford, New York, and it also became public knowledge that a shooting incident occurred at said Inn on the evening of February 24, 1973, while the trial was in progress, involving the defendant, Louis Charles King, Jr., and law enforcement officials of the State of New York and the United States. That subsequent to the sentencing of the above named defendants, your affirmants had occasion to converse with one Ronald Wakeel.

That the said Ronald Wakeel throughout the course of the trial, prior thereto and presently was and still is the manager of said Ramada Inn situate on Burrstone Road, New Hartford, New York, and in particular, he was the manager in charge at the time that said incident above referred to occurred.

7. That in the course of discussion with the said Ronald Wakeel, he voluntarily offered to state to your affirmants that the jurors, who were housed at said Inn, each occupied rooms containing television sets, which sets were in proper working order. He further advised your affirmants there was no method by which the Inn management could monitor said television sets from a central location. He stated in effect that the choice of programming would be entirely up to the respective jurors and that the management and employees of the motel could do nothing to control what programs they did or did not watch.

8. That he also advised your affirmants that the United States Marshal had custody of said jurors, but that there was not a United States Marshal in each and every juror's roon throughout the evening to assure what programs were being watched. Furthermore, he informed affirmants that the said jurors as sequestered, ate in the main dining room open to the general public. That he did state that any and all newspaper articles pertaining to the trial of said case were deleted from the newspapers given to the jurors. However, he was quick to remind your affirmants that other patrons using

the dining room and public portions of the motel, such as the lobby, had newspapers at their disposal, which contained full accounts of the trial and in particular, full accounts of the shooting incident.

9. That the shooting incident occurred on the evening of February 24, 1973, which was a Saturday evening and that nocchange in the scheduling with respect to the feeding of the jurors took place until February 26, 1973, some two days later at which time, the U.S. Marshal's office advised the Ramada Inn that the jury was to be seperated from the public dining rooms for their subsequent meals.

10. In addition, on February 26, 1973, which was a Monday, Mr. Wakeel informed us that they received an order to remove the television sets from the rooms of the jurors, but within a matter of hours, that order was countermanded and the television sets were returned to the rooms of the individual jurors. He assured affirmants that neither he nor any of his employees did anything as far as they were concerned, mechanical or otherwise, which would have prevented the jurors from watching the programs and/or channels they desired to watch.

11. That Mr. Wakeel advised your affirmants that the main topic of discussion following at the Ramada Inn with regard to its employees and patrons, was the shooting incident and its relationship to the trial in progress.

12. Furthermore, the news media such as radio, television and the newspapers, contained frequent and extended accounts of the incident throughout the day and evening and in particular, throughout February 25, 1973, which was a Sunday, and February 26, 1973, which was a Monday and furthermore for many days thereafter.

13. That the said Mr. Wakeel told us that in his opinion, he felt that it was almost impossbile for the jurors not to have learned about the incident occurring at said motel involving the defendant, Louis Charles King, Jr.

14. That your affirmants requested that he sign an Affidavit swearing to the facts of his conversation as related to us and was advised that such an Affidavit would be used to petition the Court for a hearing to determine whether in fact, the jurors did have knowledge of the incident, thereby depriving these defendants of a fair and impartial trial. The said Ronald Wakeel at first indicated his willingness to sign such an Affidavit, but after several weeks he informed your affirmants that because of his position at said motel and by a directive of the Board of Directors of the Ramada Inn that he could not sign the Affidavit.

15. Mr. Wakeel stated that he would testify fully and completely of all the facts pertaining to the incident without reservation at any hearing directed by the Court.

16. Your affirmants verily believe that because of the circumstances surrounding the entire incident, because of the method in which the jury was sequestered and the apparent access to television sets, newspapers

and conversations of other patrons using the said dining room and common hallways and the lobby of said motel it is highly unlikely that they would not have knowledge of the incident or at least some of them would not have knowledge of the incident involving the defendant, Louis Charles King, Jr.

17. That because of the admonition of Justice Lloyd F. McMahon, your affirmants are prohibited from questioning the jurors. That this affirmation is respectfully submitted to the Court for the purpose of inducing the Court to grant a hearing wherein witnesses including the jurors can be called to testify under oath solely on the question of whether or not they had knowledge of the shooting incident involving the defendant, Louis Charles King, Jr., and moreover, whether any of the facts that they may have learned, whether through newspaper accounts, broadcasts, telecasts, and conversations with possible patrons and employees of the Ramada Inn' did in some way or manner affect their deliberations of the trial, and whether or not these facts should not have been shown or made known to the trial judge, although motions were made in connection with the same and denied.

Your affirmants verily believe that any facts of the shooting incident known by one or more of trial jurors during the course of the trial would in fact affect their deliberations in arriving at a true verdict based upon all the evidence, and would in fact affect the respective interests of each or all of the defendants in a joint trial.

**WHEREFORE,** your affirmants respectfully request that an Order be granted pursuant to Title 28 of the United States Code Section 2255 setting aside and vacating the sentence heretofore imposed upon the defendants, Louis Charles King, Jr., James Vincent Talerico, Jack Zogby, Carl M. Mazza, on the grounds that the sentence imposed was in violation of the Constitutional rights of these defendants in that they were not given a fair trial pursuant to the rights guaranteed to them by the Sixth Amendment to the Constitution of the United States, and were further deprived of the equal protection of laws as guaranteed to them by the Fourteenth Amendment of the Constitution of the United States and, the defendants further move for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure on the grounds, that a new trial is required in the interest of justice or in the alternative for a hearing to determine whether or not there should be a voir dire of the trial jury, and for such other and further relief as the Court may seem just and proper.

Ap 17, 1975

s/ Louis T. Brindisi
Louis T. Brindisi

s/ John A. Longeretta
~~Thomas~~ A. Longeretta
John

s/ Joseph T. Manganelli
Joseph T. Manganelli

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ) | |
| | ) | Civil No. 75-CV-172 |
| v. | ) | |
| | ) | **GOVERNMENT'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION PURSUANT TO 28 USC §2255.** |
| LOUIS CHARLES KING, JR.,<br>JAMES VINCENT TALERICO,<br>JACK ZOGBY, and<br>CARL J. MAZZA. | ) | |

On March 1, 1973 the defendants King, Talerico, Zogby, and Mazza were convicted in this District on a jury verdict of violations of Title 18, United States Code, Sections 892 and 894, Extortionate Credit Transactions, and were thereafter sentenced to prison terms which they are presently serving. They appealed their convictions to the Second Circuit Court of Appeals and lost, 486 F.2d 1397 (2d Cir., November 28, 1973), cert. denied, 416 U.S. 958, 91 S.Ct. 1974 (April 22, 1974). They have now filed a motion to set aside their sentences and convictions, pursuant to 28 U.S.C. §2255. The government respectfully submits this memorandum in opposition to this Section 2255 motion.

The government respectfully submits that the defendants' motion should be denied without further proceedings on the following grounds:

1. The application on its face is insufficient;
2. The motion and the files and records of the case conclusively show that these prisoners are entitled to no relief;
3. The issue raised in the motion has been completely litigated at the trial and direct appeals in this matter;
4. The prisoner King has pleaded guilty to one of the charges against him stemming from the incident he claims prejudiced the jury against him and he cannot now attempt to take advantage

of his own deliberate criminal conduct; and

5. Further proceedings upon such a patently insufficient application could only result in needless further harassment of the trial jury which has already been threatened.

## THE APPLICATION ON ITS FACE IS INSUFFICIENT

This Court has very recently spoken on the sufficiency of an affidavit in support of a §2255 motion and has been affirmed by the Second Circuit Court of Appeals, Simmons v. United States, 354 F.Supp. 1383 (N.D. N. Y. 1973, MacMahon, J., sitting by designation), aff'd sub nom, Dalli v. United States, 491 F.2d 758 (2d Cir. 1974). The facts in the Simmons-Dalli 2255 case are almost identical to those herein and the law set out in the Dalli opinion compels this Court to deny the present 2255 motion without a further hearing.

Just as in Dalli, the King 2255 motion is supported by an affirmation which is nothing more than a recitation of hearsay and conclusions about an issue which these defendants litigated at trial and on appeal, all the way to the Supreme Court. It is nothing new even if it were competent evidence. That the affirmation here is hearsay makes it incompetent, Dalli v. United States, 491 F.2d 758, 760 (2d 1974); D'Ercole v. United States, 361 F.2d 211, 212 (2d Cir. 1966) cert. denied 385 U.S. 995, 87 S.Ct. 610 (1966) rhg. denied 385 U.S. 1032, 87 S.Ct. 758 (1967); United States v. Catalano, 281 F.2d 184 (2d, 1960), cert. denied 364 U.S. 845, 81 S.Ct. 88 (1960). Since it is hearsay and therefore incompetent evidence, this Court can and should deny the application without a further hearing. In D'Ercole the Court of Appeals indicated that if the hearsay was true in that case the defendant would have been entitled to a new trial, the relief he was seeking. But since the application was supported by only incompetent hearsay, the Court of Appeals went on to say, the trial court was correct in denying the motion without a hearing. A fortiori this King 2255 motion should be denied without a hearing since it is supported by only incompetent hearsay and unlike the D'Ercole case even if this hearsay were true, it would not entitle these defendants to a new trial. The hearsay only alleges conclusions about the recollection of Ronald Wakeel as to the conditions of the jury's sequestration. It does not establish that the jury vote for a guilty verdict was caused by factors outside the trial record evidence. Therefore, since it was proper to deny the motion in D'Ercole because it was hearsay, it is certainly proper to deny the motion herein which is not only hearsay but also immaterial hearsay.

It is important to note that at trial, upon more serious allegations, (see p. 744 of Trial Transcript where one defense attorney alleged the jury actually had in its possession unedited newspapers -- an allegation inconsistent with the allegations in the present 2255 motion) these defendants fully argued and litigated these very questions and then appealed all the way to the Supreme Court. These issues, therefore, have received full litigation to no avail and as the Court in Dalli indicated, 491 F.2d at 761, since these issues have already been litigated, it must be required that an application on the basis of newly discovered evidence such as this application should set forth its alleged evidence with greater specificity.

Much the same as the Court in Dalli questioned the reliability of the supporting affidavit therein, the allegations set forth in the affirmation herein should be viewed suspiciously. The allegations concern an incident which is well over two years old and at the time the question of whether the jury knew of this incident was well publicized. Yet, Mr. Wakeel's stale information surfaces only after more than two years have passed. In addition, the reliability of the statements of one who will not put them into affidavit form is open to serious question. Since the affirmation is all hearsay and the alleged declarant of those allegations won't put them into affidavit form, and since these allegations are so stale and even if true are immaterial and not grounds for a new trial, this Court should deny the motion on the basis of an insufficient application. To paraphrase the Second Circuit,

> With the obvious deficiencies of the [defense attorneys' affirmation] viewed against the files and records of the case and in light of the fact that petitioner[s] had already had one hearing on substantially the same claim the trial court [will] not err in denying the petition without a hearing.

Dalli, supra. 491 F.2d at 762.

Which brings us to the second ground for denying this application.

## MOTION, FILES AND RECORDS CONCLUSIVELY SHOW THEY [illegible] ENTITLED TO NO RELIEF.

Title 28, United States Code, Section 2255 specifically notes that this Court can deny the motion if the motion, the files and records of the case conclusively show that the prisoner is entitled to no relief. The mere fact that this Court has caused notice of the motion to be served on the United States Attorney's office does not prohibit it from denying the motion without a hearing upon a review of the motion and the facts and records of the case, Mitchell v. United States, 359 F.2d 833, 835-36 (7th Cir. 1966).

The motion herein is a hearsay allegation that the conditions of the jury sequestration were such that the jury could have heard about the allegedly prejudicial incident. Even if these allegations were supported by credible, competent evidence, which they are not, it is still no basis for the relief sought, a new trial. The trial court immediately ascertained at the time of trial that the jury did not hear of the incident (Tr. p. 661) and that the televisions were turned off (Tr. p. 1045). Therefore, the files and records show this issue has already been resolved. These alleged statements by Mr. Wakeel are nothing new anyway. They are only another person's conclusory opinions about a question of fact already decided against these defendants at trial, at post verdict motions, at the Court of Appeals on the direct appeal, and at the Supreme Court on the direct appeal. These conclusions are drawn by a person who was not charged with the responsibility of protecting these jurors from such outside influence and are directly opposite to what the Marshal advised the Court; and it was the Marshal's responsibility to be aware of these dangers. He would have been in a better position to know the facts which he related to the Court at the time of trial.

A review of the files and records of the case show that the Court prevented the jury from learning of this incident. The Court admonished the jury sternly on numerous occasions to avoid talking with others about the case or reading about the case or listening to the radio or television coverage of the case. (Tr. pp. 207 - 208, 477, 595, 654, 742, 814, 859, 961, 1025, nine different occasions). Indeed the Court sequestered the jury to avoid this very problem (Tr. p. 12). It cannot be assumed on the basis of the incompetent, unreliable, hearsay assertions in this 2255 motion that the jury ignored these very stern admonitions of the trial court, United States v. Marshall, 458 F.2d 446, 452 (2d Cir. 1972); rather it is presumed that the jury heeded these instructions. As the Seventh Circuit Court of Appeals has indicated in its opinion affirming the denial of a 2255 motion without a hearing, this trial Court can certainly rely on its own personal knowledge of how juries are kept separated from the public; and the trial Court is entitled to rely on the jury and its custodians to obey its rules, Burris v. United States, 430 F.2d 399, 401, 402 (7th Cir. 1970) cert. denied, 401 U.S. 921 (1971).

A review of the files and records of this case as to the careful jury deliberations will show that they are entitled to no relief.

That the jury did not hear of the incident or consider it to the prejudice of the defendants can be seen from the care with which they deliberated their verdict. The jury received the case following the Court's instructions at 11:45 A.M., on Wednesday, February 28, 1973 (p. 1003). At one point they requested to hear again the Court's charge on Count I. They deliberated until 5:50 P.M. when they requested to hear the tape recordings again. (p. 1019). With the consent of the defendants and the government the jury read the various transcripts during the course of the evening and continued to deliberate until 10:30 P.M. that evening. (p. 1026). The jury continued its deliberation on Thursday morning, with the request that it hear the tape recording of the defendant King and the victim Sackman from November 11, 1972 which conversation constituted the basis for Count III in which King was charged alone.

That tape was concluded at 12:00 noon and the jury retired. (p. 1038). Only minutes later they returned their verdict, as if they just wanted to refresh their recollection as to that particular count as to King before deciding on that, the last remaining count to be decided. At 12:15 P.M., on Thursday, March 1, 1973, the jury returned its verdict. To have taken so long when the evidence was so overwhelming (p. 1083) could only mean they were deliberating properly, considering the evidence as to each, count by count, defendant by defendant for all four defendants on all seven counts. The length and care of the jury's deliberations are indicative of the care with which the jury considered the evidence against each of these defendants, reinforcing what was clear to the trial court, that the jury had in fact no idea as to what happened over the weekend.

In reviewing this application, this Court can and should apply its own knowledge of the facts and circumstances of this trial and the jury's sequestration. The Second Circuit has pointed out that the purpose of making a 2255 motion to the trial judge is so that he can make use of his own personal observations in deciding the motion or at least this preliminary question of whether a hearing is necessary. Panico v. United States, 412 F.2d 1151, 1155 - 56 (2d Cir. 1969), affirming a similar decision of this Court. See also Mirra v. United States, 379 F.2d 782, 787 (2d Cir. 1967); Vicars v. United States, 488 F.2d 531, 532 (5th Cir. 1973).

The government respectfully submits, therefore, that a review of this motion, and the files and records in this case conclusively show these defendants are entitled to no relief. The motion raises nothing new nor is it supported by competent or material evidence. The insufficiency of the application is highlighted by the files and records of the case which show that the issue raised in this motion has already been litigated and also that the allegation that the jury might have known of the weekend incident is simply not supported by the record which shows that the Court prevented the jury from knowing about it and satisfied itself at that time that the jury did not know of the incident.

## THIS ISSUE HAS ALREADY BEEN LITIGATED

The government submits that this 2255 motion should be denied without a further hearing since the matter has already been exhaustively litigated and the present motion raises no new material evidence.

At trial all defense counsel moved for a mistrial and a voir dire of the jury. (tr. p. 658, 660, 663, 744). At trial defense counsel alleged a more material allegation, that the jury had unedited newspapers in its possession (tr. p. 744). The trial Court heard argument and determined that no voir dire nor evidentiary hearing was necessary in view of its own knowledge of the facts and the posture of the trial. After the trial on March 1, 1973 at post-verdict motions, the Court again heard arguments from three of the present defense attorneys and a fourth attorney who was at that time assigned to represent defendant Zogby. The Court even recessed to allow defense counsel an opportunity to prepare for these motions. (Tr. p. 1041, 1042, 1043, 1045, 1051, 1053, 1056, 1061, 1062, 1074 - 1087).

On the direct appeal each defendant represented by, at that time court-appointed counsel who are, with one exception, the same counsel representing these defendants on this motion, argued these same issues -- mistrial and voir dire hearing -- and lost. They then took these same issues to the Supreme Court where Certiorari was denied. The law is clear that a 2255 motion is not meant to relitigate issues that have already been settled. [illegible] v. United States, 491 F.2d 758 (2d Cir. 1974); Vicars v. United States, 488 F.2d 531 (5th Cir. 1973); Williams v. United States, 334 F.Supp. 669 (S.D. N. Y. 1971, Weinfeld, J.) aff'd 463 F.2d 1183 (2d Cir. 1972) cert. denied, 409 U.S. 967, 93 S.Ct. 299; Panico v. United States, 412 F.2d 1151 (2d Cir. 1969) cert. denied 397 U.S. 921, 90 S.Ct. 901 (1970); Mirra v. United States, 379 F.2d 782 (2d Cir. 1967) cert. denied 389 U.S. 1022, 88 S.Ct. 593.

The defendants will no doubt respond that these alleged comments by Mr. Wakeel are newly discovered evidence. This Court, however, can certainly determine from its own recollection of this case that although what Mr. Wakeel allegedly says may not have been heard by the Court before, it is really nothing new or material. Much like the Second Circuit in affirming a prior ruling of this Court in Panico, supra. 412 F.2d at 1155, this Court should hold that the information alleged in this affirmation is at best cumulative and of doubtful validity.

Furthermore, as Judge Weinfeld said in Williams, supra, 334 F.Supp at 671, section 2255 is not to "be applied in a collateral attack based upon a fragmentized claim which petitioner raised in a slightly different fashion at his trial and upon appeal."

A review of the files and records in this case by this, the presiding trial judge, will clearly show that this 2255 motion raises nothing new that has not already been litigated. Therefore, the motion should be denied without a further hearing.

## KING CANNOT EXPLOIT HIS OWN DELIBERATE CRIMINAL CONDUCT

The prisoner King should not be allowed to claim that he was denied a fair trial as a result of his own voluntary, deliberate, criminal, act of violence. This Court held a hearing to determine the voluntariness of King's conduct and ruled it was voluntary (Tr. pp. 1069, 1074 - 1087). In addition, King entered a guilty plea to one of the charges stemming from the weekend incident which only reaffirms the correctness of this Court's ruling. The 2255 motion on his behalf should be denied because it would be an outrageous miscarriage of justice to allow a defendant to receive a new trial or even a hearing on this motion as a result of his own deliberate misconduct during trial. "The language of the statute does not strip the district courts of all discretion to exercise their common sense." Machibroda v. United States, 368 U.S. 487, 495, 82 S.Ct. 510, 514 (1962).

## FURTHER PROCEEDINGS PRESENT NEEDLESS DANGERS TO INNOCENT PEOPLE, THE JURY

The government submits this Court should deny the motion without a hearing because the record shows that a hearing would subject the trial jurors to further anxiety, harassment, or other improper influences. In view of the patent insufficiency of this motion the risk to the jury that would arise if a hearing were to be granted is unwarranted.

As this Court is aware from the trial, attempts to reach the jury were planned (See e.g., Tr. p. 1048, 1082, 1086) and if these defendants or their friends were considering attempting to reach a trial juror before trial, then it is quite obvious that such attempts would be considered again.

The defense may argue there is no basis for this kind of argument since the defendants are in custody and the trial is over. But the defendants were in custody and the trial was over when the jury was threatened shortly after the verdict (Tr. p. 1060). This Court can certainly recall emotional outbursts in the courtroom when the defendants' friends and families heard this jury announce its verdict.

The jury has performed its civic duty by being sequestered for approximately two weeks and deliberating this case carefully. A hearing on this motion can only expose them to probable harassment or additional threats which is totally unnecessary in view of this insufficient application.

It has been in excess of two years since the trial and by now those jurors have certainly learned of the weekend incident of violence. By now it is almost certain that at least a few jurors would not be able to differentiate exactly when they learned of the incident or how they learned of it. With the suggestion of defense counsel some of the jurors, at this point, might even be so confused that they would testify they did know about the incident before returning their verdict. The government submits that their testimony at this point would be entirely useless. In view of the record in this case it is entirely possible that some jurors may have already been contacted by friends or family of these defendants.

In view of all this compared to the insufficiency of the application and in view of the fact that this issue has already been fully litigated, the government submits this Court should deny this motion with no hearing.

## REVIEW OF THE FILES AND RECORDS OF THE CASE

To assist the Court in its review of the files and records of this case, the government submits the following are significant.

TRIAL

| Trial Transcript Page | Day | Date | Description |
|---|---|---|---|
| pp. 1 - 82 | Tues. | 2/20/73 | In Camera pretrial motions hearing. |
| 83 - 118 | Wed. | 2/21/73 | " " " " " |
| 118 - 150 | Wed. | 2/21/73 | Jury Selected and Sequestered. |
| 151 - 157 | Wed. | 2/21/73 | Defense Motion for non-public trial. |
| 207 - 208 | Wed. | 2/21/73 | Court's First Admonition to Jury at the end of Wednesday Jury's first day of trial. |
| 255 | Thurs. | 2/22/73 | Start of Second Day of testimony - a Thursday. |
| 477 - 78 | Thurs. | 2/22/73 | Court's admonition to jury at end of second day of trial for jury. |
| 480 | Fri. | 2/23/73 | Start of third day of testimony. |
| 595 | Fri. | 2/23/73 | Court's admonition to JURY at FRI. LUNCH. |
| 654 | Fri. | 2/23/73 | Court's admonition to JURY JUST BEFORE WEEKEND RECESS. |
| 655 | Mon. | 2/26/73 | Start of second week of trial. |
| 658 | Mon. | 2/26/73 | First Motion for mistrial at 10:58 A.M. |
| 660 | Mon. | 2/26/73 | Motion for Voir dire. |
| 661 | Mon. | 2/26/73 | Court's ruling. |
| 663 | Mon. | 2/26/73 | Court's ruling applies to all defendants. |
| 664 | Mon. | 2/26/73 | Trial proceeds before the jury. |
| 692 | Mon. | 2/26/73 | At 11:50 a.m., the Government rests. |
| 742 | Mon. | 2/26/73 | Court's admonition to Jury at lunch break. |
| 744 | Mon. | 2/26/73 | Brindisi seeks Voir dire re: Newspapers to Jury. |
| 814 | Mon. | 2/26/73 | Court's admonition to Jury at end of day. |

(REVIEW OF THE FILES AND RECORDS OF THE CASE -- TRIAL) continued --

| Trial Transcript Page | Day | Date | Description |
|---|---|---|---|
| pp. 821 | Tues. | 2/27/73 | Trial continues, second day of 2d week. |
| 823 | Tues. | 2/27/73 | Dr. Millett testifies re: King's condition at St. Luke's Hospital. |
| 831 | Tues. | 2/27/73 | Court notes King's appearance. |
| 859 | Tues. | 2/27/73 | Court's admonition to jury at Tues. lunch break after testimony taken at hospital. |
| 905 -907 | Tues. | 2/27/73 | Brindisi summation excerpt which the government contends was deliberate attempt to gain mistrial. |
| 961 | Tues. | 2/27/73 | Court's admonition to jury at end of day Tues. |
| 1003 | Wed. | 2/28/73 | At 11:45 A.M. jury retires to deliberate. |
| 1025 | Wed. | 2/28/73 | At approximately 10:30 Pm. jury retires for night with Court's admonition. |
| 1027 | Thurs. | 3/1/73 | Jury resumes deliberations. |
| 1038 | Thurs. | 3/1/73 | Jury returns verdict. |
| 1039 | Thurs. | 3/1/73 | Court's final admonition to jury. |
| 1041 | Thurs. | 3/1/73 | Motions renewed. |
| 1042 | Thurs. | 3/1/73 | Court allows attorneys more time to prepare motions. |
| 1043 | Thurs. | 3/1/73 | Motions renewed at 3:00 P.M. |
| 1045 | Thurs. | 3/1/73 | Court rules jury did not get the news and indicates TVs were turned off. |
| 1051 - 1069 | Thurs. | 3/1/73 | Further motions and rulings. |
| 1074 - 1087 | Thurs. | 3/1/73 | Court's formalized ruling. |
| 1090 - 1106 | | 3/23/73 | Sentencing Mazza, Talerico, Zogby. |
| 1108 | | 5/25/73 | Sentencing King. |

PERTINENT APPELLATE RECORD

King Brief pp. 5, 6, 7, 8, Statement of Facts.

Point IV, p. 15 - 17.
Point V, pp. 18 - 22.
POINT VIII, p. 28 joins in arguments of co-defendants.

Talerico Brief, pp. 7, 8, 9, Statement of Facts.

Point III, pp. 12 - 15.
Point IV, pp. 15 - 16.
Point V, p. 16 joins arguments of co-defendants.

Zogby Brief, pp. 7, 8, 9. Statement of Facts.

Point I, pp. 10 - 21.
Point V, p. 37 joins arguments of co-defendants.

(PERTINENT APPELLATE RECORD)-- continued --

Mazza Brief, pp. 9 - 12 Statement of Facts

Point I, pp. 13 - 17.
Point II, pp. 18 - 20.
Point IV, p. 25 joins arguments of co-defendants.

Government's Brief, p. 2 - 3. Statement of the Case.

Point I, pp. 4 - 11
Point II, pp. 12 - 15
Point III, pp. 10 - 25.

AFFIRMED WITHOUT OPINION, November 28, 1973, 486 F.2d 1397 (2d Cir. 1973).
Petition for Cert. by King, Talerioo & Mazza. pp. 6, 7, 8, 9, 10, 11, 12.

Solicitor General's Memo of United States in Opposition, pp. 4, 5, 6, 7.

Cert. denied 416 U.S. 958, 91 S.Ct. 1974 (April 22, 1974).

## CONCLUSION

The government respectfully submits that on the basis of the motion, files and records of this case and the arguments set forth above, this motion for relief pursuant to Title 28, United States Code, Section 2255 should be denied without a hearing.

JAMES M. SULLIVAN, JR.
United States Attorney for the
Northern District of New York

By Eugene Welch
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Assistant U. S. Attorney
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Louis T. Brindisi
Attorney and Counselor at Law

Gustave J. DeTraglia, Jr.

747 Bleecker Street
Utica, New York 13501
Area Code 315
733-2396

June 18, 1975

U. S. DISTRICT COURT
N. D. OF N. Y.
~~FILED~~ recd
JUN 20 1975
AT ____ O'CLOCK ____ M.
J. R. SCULLY, Clerk
UTICA

United States District Court
Office for the Clerk
Northern District of New York
Utica, New York 13503

Re: U. S. vs. Louis Charles King

Gentlemen:

Enclosed herein is a letter I received recently from my client which I would like to have made part of the motion made by all defendants pursuant to 28USC §2255.

Very truly yours,

Louis T. Brindisi/sm

LOUIS T. BRINDISI, ESQ.
LTB:sm
Enclosure

cc: United States Attorney
Joseph Manganelli, Esq.
John Longeretta, Esq.
Angelo Felice, Esq.

Judge ask if they
are going to submit
anything, as to [illegible]
[illegible]

June 5, 1975

Mr. Louis Brindisi, Esq.

I believe that in his instructions to the jury after the verdict (T pp 1039 and 1040), the judge exceeded his authority. He may lawfully be entitled to instruct jurors to report threats, harassment, questions on their deliberations, etc., but his actual order was too broad and frightened everyone away from pursuit of an inquiry into a critical and legitimate point of our case. He should have been asked to clarify such instructions.

The record reflects only the judge's word that some unidentified Marshal assured the court that no outside information or contacts about the trial or forbidden incidents reached the jurors while sequestered away from the court. Our opinion is that the judge became cognizant of some misconduct, and the instructions now complained of was a deliberate attempt by the judge to prevent discovery of a vital error, and it was a scare tactic that accomplished its purpose. The judge had a vested interest in concealment of any incident that would abort the process against us. With T.V.'s in the rooms, availability of telephones, contacts with employees of the motel, newspapers, etc., without strict supervision by Marshals, there is no doubt in our minds that at least the shooting of Louis King was known by some jurors, if not all. Did the Marshals listen to both sides of telephone conversations? Did they monitor every minute of TV programs in each room to assure no spot news announcements were heard by any juror? Such specific questions should have been put to specific individuals for proper determination . We can do so now and correct such deficincy in our present legal process.

This is important and can mean so much to us, that the job should be very thorough and be done absolutely right this time. A judge cannot prevent legitimate investigation into such a vital point of fundamental fairness that could result in a reversal of conviction and sentence, on direct or collateral process. I see no reason in such circumstances why the jurors and Marshals cannot be questioned on events that occurred away from the court while they were sequestered.

The means by which you do this is left to you. Such as by private investigators properly witnessed, by depositions, or interrogatories. There exists some legitimate methods by which our purpose can be accomplished. We believe discovery of the unidentified Marshal, that assured the judge on the jurors, should be made. And possibly, request that Judge McMahon disqualify himself from this inquiry phase of the proceedings.

Let us know your opinion of the contents of this letter, and the attached case. What are your intentions now, in view of all this, as to pursuit of the matter? Waiting to hear from you soon, I remain

Sincerely,

Here is an annotated case from 28 U. S. C. 2243, page 222, note 65, which should be of interest to you.

Where collateral attack on conviction was based upon allegations of misconduct of the jury, the marshal and his deputies, and it was alleged that the facts relied upon were discovered subsequent to the trial, conviction, affirmance and commitment, an inquiry conducted by the trial court was an appropriate exercise of the extraordinary remedy afforded by ha beas corpus. Baker v Hudspeth, CCA Kan 1942, 129 F. 2d 779, cert. denied 63 S. Ct. 201, 317 U. S. 681; rehearing denied 63 S. Ct. 264, 317 U. S. 711; rehearing denied 63 S. Ct. 767, 318 U. S. 800. (Please note the frantic efforts by the government to set this decision aside)

Since Baker, supra, instructs that questions on jury conduct are within the scope of collateral attack (which include 2255 motions), it is a gross abuse of the court's power to issue instructions that prevent legitimate inquiry into activities, conduct, and contacts of a jury while sequestered away from the courtroom.

If an incident is suspect that would, or could, influence the minds of jurors in their deliberation and knowledge of such incident is to be denied the jurors, it is insufficient that the court alleges it was assured by a U. S. Marshal the incident remained unknown to the jurors.

Such circumstance involves a point of positive reversal and the defendants are entitled to obtain proof to such an essential fact, by statute and constitutionally. This is a matter that must be inquired into by oath, both marshals and jurors, to search for the truth and assure that due process and equal protection of the law was complied with. In such case, the court is obligated todetermine such matter, not evade it.

Had the trial court fulfilled its duty at the appropriate time, rather than allege assurance by some marshal, defendants would have had a mistrial declared, or assured of a reversal on appeal. Then additional possible defenses may have been available, such as double or former jeopardy. So on the 2255 motion, the court should receive depositions, conduct interrogatories, subpoena witnesses, or do whatever else is necessary, to find out if the jurors became knowledgeable of any forbidden incident from T.V., newspapers, telephones, waitresses, etc. The affidavit from the motel manager opened the door, and now is the time to pursue this 100%. GET WITH IT!

Mr. Louis Brindisi, Esq.,
Attorney-at-law,
747 Bleeker Street,
Utica, N. Y. 13501

June 30, 1975

Dear Mr. Brindisi:

Jack Zogby has received a letter from Attorney Angelo Felice idicating that you and he, together with counsel for Mazza and Talerico, are preparing to file a motion for a new trial for myself, Zogby and the rest of the co-defendants on the grounds of newly discovered evidence (consisting of a statement made by Ronald Wakeel of the Ramada Inn that the jurors did have knowledge of the shooting incident during the trial).

This is to advise that I do not want any such motion filed on my behalf at this time. I am presently in the process of engaging other counsel to make a thorough review of my case toward the end of filing a motion to vacate the sentence and conviction under 28 U. S. C. 2255. There are several grounds I wish to assert in addition to the one you are attempting to raise now, but I have not completed my research and investigation pertaining to these other points yet, and I fear that if you file anything now, you will raise problems for me later under the "successive petitions" doctrine of Sanders v U. S., 373 U. S. 1 (1963).

So, to reiterate, please do not file anything on my behalf at this time. If you have done so, please withdraw same immediately, before the court makes any ruling thereon.

Very truly yours,

Louis King

cc: Mr. John A. Longeretta, Esq.,
Mr. Joseph T. Manganella, Esq.,
Mr. Angelo N. Felice, Esq.,
Atty. Louise Knight

PS Form 3811, Nov. 1973

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4. SIGNATURE [illegible] T. Price

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4. SIGNATURE [illegible] T. Brundisi

By: Susan Manley

DATE OF DELIVERY 7/3/75

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Louis T. Brindisi
Attorney and Counselor at Law

Gustave J. DeTraglia, Jr.

747 Bleecker Street
Utica, New York 13501
Area Code 315
733-2396

July 7, 1975

Mr. Louis King 38843
P. O. Box 1000
Lewisburg, Pennsylvania 17837

Re: U.S. Vs. King

Dear Louis:

I am enclosing herein a copy of the papers which we filed on your behalf under 28 U.S.C. 2255.

I acknowledge receipt of your recent correspondence dated June 30, 1975, in which you requested that I do not file any papers on your behalf.

These papers have been filed and I am enclosing herein a photostatic copy of your letter dated June 5, 1975, which indicated to me that you wanted us to pursue this matter.

After you review the enclosed I would appreciate your advising me as to whether or not you want us to submitthese motions or whether you want me to withdraw them. If you want me to withdraw them, write me immediately.

Very truly yours,

Louis T. Brindisi/sm

LOUIS T. BRINDISI, ESQ.
LTB:sm
Enclosures

Mr. Louis Brindisi, Esq.,
Attorney-at-law,
747 Bleeker Street,
Utica, N. Y. 13501

July 10, 1975

Dear Mr. Brindisi:

I am in the process of completing the file on my case and I lack a number of items. Please send the following:

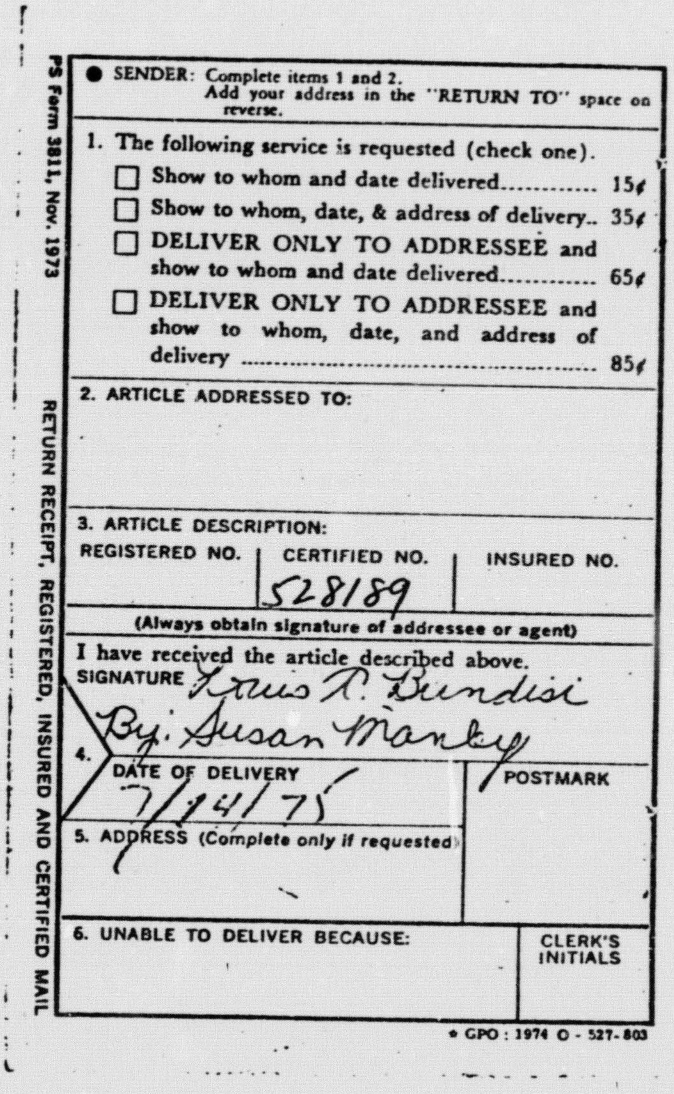
1. Copies of the post-trial motions.
2. Copy of the opinion on affirmance by the 2nd Circuit Court of Appeals. (If no copy is in your file, then submit a request to the Court Clerk and see that I get a copy).
3. Copy of the petition for a writ of certiorari.
4. And I request for the second time, a copy of the statement I made to you in the hospital. To date I have received no acknowledgment of my last letter on the matter.

Louis, I must insist on these things, and as promptly as possible. I am seriously into establishing grounds for collateral attack of my conviction, and I can't stress too much the importance of a complete record to work with, to see just what, and how, matters were submitted to the courts.

Trusting to hear from you promptly, I remain

Sincerely,

Louis King 38843,
P. O. Box 1000,
Lewisburg, Pa. 17837



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| | 528189 | |

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SIGNATURE Louis R. Brundisi
By: Susan Manley

4. DATE OF DELIVERY 7/14/75

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A 287

Hon. Lloyd F. McMahon, Judge,
U. S. District Court,
Northern District of New York,
Syracuse, New York 13201

July 17, 1975

Re: U. S. v King,
73-CR-94

Dear Sir:

Today I discovered that there is some type of proceeding for a new trial submitted to the court, and I am included with three other defendants.

Please be advised that I heard indirectly that some sort of affirmation was to be presented to the court, and on June 30, 1975, I informed Attorney Louis Brindisi by certified mail that I did not want any kind of motion filed on my behalf and if any was filed, to withdraw my name immediately. I sent copies of this letter to Messrs. Longeretta, Manganella, and Felice, also. A copy of the letter and certified mail receipts are in my possession.

On this date, I am once again sending a request to Mr. Brindisi to officially withdraw me as a party to the motion. I never desired any motion to be filed on my behalf, I so indicated to Mr. Brindisi, and I consider myself withdrawn as of June 30, 1975, and I am not a party to this action.

Respectfully submitted,

Louis King, #38843,
P. O. Box 1000,
Lewisburg, Pa. 17837

cc: Mr. Eugene Welch, Esq.,
Assistant U. S. Attorney,
Syracuse, N. Y. 13201

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4. Donald E. [illegible]

DATE OF DELIVERY JUL 23 1975

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4. Judy Ford, Dep. Clerk.

DATE OF DELIVERY JUL 25 1975

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★ GPO : 1974 O - 527-803

Mr. Louis Brindisi, Esq.,
Attorney-at-law,
747 Blecker Street,
Utica, New York 13501

July 17, 1975

Dear Lou:

I received your envelope today, and noted the contents and your letter. Evidently we misunderstand each other in our communications, or something. My letter of June 30, 1975, clearly stated that I did not want to be included in any motion for a new trial, and if any had been filed, to withdraw my name. I explained my reasons.

Now I find that a motion has been filed for some time under 28 U. S. C. Section 2255, with four of the defendants as parties to said motion, including me. So, I say again, please submit an official notice of withdrawal for me immediately. As far as I am concerned, I withdrew as of the date of the letter on June 30, 1975. The others can continue if they so desire, and probably will, but without me.

I took the liberty of expressing my desires on the matter, to the court, with a copy to Mr. Welch, even though the official withdrawal must come from you as attorney of record.

Lou, our understanding was that a sort of affirmation hearing was to be held with either Jimmy or Jack as the party. No one expected that the affirmation alone, with no further development would be submitted as a 2255 motion with all four as parties to it. If you reread my letter of June 5th, you will note it is all suggestions on how the issue possibly could be explored and developed, to make a case for 2255. As it now stands, the motion before the court does not even have one case cited in support of the issue.

You may not know, but a court is reluctant to let a petitioner have one good shot collaterally, and certainly would invoke a procedural bar to successive petitions. So you can understand my position when I tell you I can't be included in the motion presently before the court. I also prefer that the court and the U. S. Attorney's office remain in the dark as to my intentions on future legal process.

In regards to the other documents previously requested from you, Lou, please send me by return mail, a copy of the application to the Supreme Court for certiorari, copies of the post-trial motions to McMahon, and once again, please send me the statement I made in the hospital. PLEASE! Thanks, I hope to hear from you soon.

Cordially,

Louis King

S Form 3811, Nov. 1973

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SIGNATURE Louis F. Brundisi
By. Susan Marky

DATE OF DELIVERY
7/23/75

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Louis T. Brindisi
Attorney and Counselor at Law

Gustave J. DeTraglia, Jr.

747 Bleecker Street
Utica, New York 13501
Area Code 315
733-2596

August 21, 1975

Mr. Louis King 38843
P. O. Box 1000
Lewisburg, Pennsylvania 17837

Re: People vs. King

Dear Lou:

Pursuant to your recent correspondence, I have sent letters to the Clerk of the United States District Court and also to the Attorney General's Office withdrawing your name from the motion which was made pursuant to 28 U.S.C. Section 2255.

I am going to be in the Lewisburg area within a couple of weeks and I am wondering whether or not you would like to discuss this matter with me and, if you do, please advise. I can assure you I will do everything within my power to help you in any way that I possibly can since I have always considered you as a friend and I would never do anything, intentionally, to hurt you in any way.

Very truly yours,

LOUIS T. BRINDISI, ESQ.
LTB:sm

Mr. Louis T. Brindisi, Esq.,
Attorney-at-law,
747 Bleeker Street,
Utica, New York 13501

September 29, 1975

Dear Lou:

I received an unexpected item of news last week, and there just can't be any basis for it. I read a copy of the Order and Opininn by Judge McMahon decided on September 5, 1975, and filed in the Court on September 11, 1975, that denied the "so-called" motion under 2255. The portion I can't understand is that Judge McMahon included me in the motion and the denial.

Let's review what I did to withdraw from the action: On June 30, 1975, I mailed you a letter of withdrawal with copies to Longeretta, Manganella, Felice, and Knight. My desires could not be misunderstood, and on July 7, 1975, you acknowledged receipt of said letter.

On July 17, 1975, I again let it be known in a letter to you, that I wanted nothing else than to withdraw. On the very same date, I personally sent an explicit letter to Judge McMahon, with copy to Mr. Welch, that could not be misunderstood. I received the signed return recipts.

Once again, I want to assure you that I know you can't be responsible for any of this, as I have your letter of August 21, 1975, in which you very specifically told me that you also sent letters of withdrawal to not only the Office of the Clerk, but to the Attorney General's Office.

My purpose for writing this time is to find out just what that Judge McMahon has in mind. With all the letters for evidence, and the substantiating return receipts, how can he hold me to the motion? It is my choice whether to submit such motion, or not.

So, Lou, please drop me a few lines and tell me just what the official score is. As far as I am concerned, I just was not part of the action. Right? Take care, buddy, and respond at your convenience. Thanks.

Cordially,

Louis King, 38843,
P. O. Box 1000,
Lewisburg, Pa. 17837

cc:
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Louis R. Brindisi
By: Susan Marley

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1975
AT ____ O'CLOCK ____ M.
J. R. SCULLY, Clerk
UTICA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

---------------------------------------x
UNITED STATES OF AMERICA, : 75-CV-172
(73-CR-9)

- v - : **MEMORANDUM**

LOUIS CHARLES KING, JR. et al., :

Defendants. :
---------------------------------------x

MacMAHON, District Judge.*

Defendants King, Mazza, Talerico and Zogby seek post-conviction relief.

Defendants were convicted following a jury verdict on March 1, 1973 of making extortionate extensions of credit and using extortionate means to collect extensions of credit, in violation of 18 U.S.C. §§ 892 and 894. Their convictions were affirmed without opinion, United States v. King, 486 F.2d 1397 (2d Cir. 1973), and certiorari was denied, 466 U.S. 958 (1974).

---

* Of the United States District Court for the Southern District of New York, sitting by designation.

Defendants seek to vacate the sentences imposed by the court on March 23, 1973 (Mazza and Zogby), May 25, 1973 (King), and July 19, 1973 (Talerico), pursuant to 28 U.S.C. § 2255, on the ground that their sentences were imposed in violation of the Fifth, Sixth and Fourteenth Amendments. They also move for new trials, presumably on the ground of newly discovered evidence, pursuant to Rule 33, Fed.R.Crim.P.

The trial was begun on February 21, 1973 following pretrial motions and a hearing. These applications for post-conviction relief stem from a bizzare incident which occurred on February 24, 1973 during a weekend recess of the trial. On that evening, defendant King, who was free on bail, was shot at the Ramada Inn in Utica by F.B.I. agents and New York State Police officers after [redacted] throwing a hand grenade into the home of the senior resident F.B.I. agent in Utica. The F.B.I. had prior knowledge of the attempt and agents were present during the incident. King attempted to escape by automobile but was gunned down and seriously wounded by the officers as they followed him into the parking lot of the Ramada Inn where the jury had been sequestered.

Following this incident, we denied motions for a mistrial after being assured by the deputy marshals in charge of the jury that it had no knowledge of the incident. The trial was continued in King's absence after we determined that his absence was voluntary. He testified at the hospital, in the presence of the court and jury.

Following the trial, a hearing was held on the question of King's absence from the trial, and we once again concluded that his absence was voluntary.

Defendants contend that their convictions and sentences are constitutionally infirm because the jury learned of the shooting incident during the trial, prejudicing it against all four defendants.

Insofar as the motions of defendants Zogby and Mazza seek relief under Rule 33, Fed.R.Crim.P., they are untimely. Rule 33 provides, in pertinent part:

> "A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment. . . . A motion for a new trial based on any other grounds shall be made

> within 7 days after verdict
> or finding of guilty. . . ."

A guilty verdict was rendered on March 1, 1973 and final judgments as to Mazza and Zogby were entered on March 30, 1973. Since these motions were filed on April 9, 1975, they are untimely as to defendants Mazza and Zogby.

Judgments were not entered against defendants King and Talerico until June 1, 1973 and July 30, 1973, respectively. Their Rule 33 motion based on newly discovered evidence is therefore timely.

Defendants, however, also seek federal habeas corpus relief under 28 U.S.C. § 2255. We will, therefore, consider the motions under that section as to all defendants, as well as under Rule 33 as to defendants King and Talerico.

In support of their applications, defendants submit a joint affirmation of Louis T. Brindisi, John A. Longeretta, and Joseph T. Manganelli, attorneys for defendants King, Mazza and Talerico, respectively. The affirmation states, in essence, that the attorneys talked to one Ronald Wakeel, the manager of the Ramada Inn at the time of the trial. He told them, they affirm, that the jurors had television sets in their rooms and that, although the newspapers sent to the jurors had any reference to the trial or the February 24 incident deleted, the jurors ate in a public dining room among people who may have had uncensored newspapers. Moreover, they claim that Wakeel told them that the incident of February 24 was a topic of conversation at the Ramada Inn. Finally, they claim that Wakeel stated that, although he would testify to the facts as he related them, he would not sign an affidavit containing these facts.

It is apparent that the material portions of this affirmation contain nothing more than pure hearsay. All that defendants' lawyers affirm is that they were told that these facts existed. Moreover, while they claim that Wakeel told them that the jurors had television sets, that they were in and around areas where newspaper accounts of the trial were available, and that the shooting incident was a topic of conversation, there is no declaration, hearsay or otherwise, that the jurors actually saw or heard either the news account of the trial or any conversations concerning it.

It is clear that hearsay statements, especially ones as speculative and conclusory as those before us, are not sufficient to require a hearing or to support the instant applications.[1] Assuming, however, that these statements were competent evidence, the applications must, nevertheless, be denied. These contentions were raised at trial[2] and strongly urged on appeal[3] and on petition for certiorari,[4] all to no avail.

Since defendants have raised this very same claim at trial and on appeal, they may not now raise it again.[5]

It is clear, therefore, that the motion files and records demonstrate conclusively that defendants are entitled to no relief.[6]

Accordingly, defendants' applications are in all respects denied. So ordered.

Dated: New York, N. Y.
September 5, 1975

LLOYD F. MacMAHON
United States District Judge

*United States* v. *King et al.* 75-CV-172

## FOOTNOTES

[1] *Simmons* v. *United States*, 354 F. Supp. 1383, 1386 (N.D.N.Y. 1973), *aff'd sub nom. Dalli* v. *United States*, 491 F.2d 758, 760 (2d Cir. 1974); *D'Ercole* v. *United States*, 361 F.2d 211, 212 (2d Cir.), *cert. denied*, 385 U.S. 995 (1966), *rehearing denied*, 385 U.S. 1032 (1967); *United States* v. *Catalano*, 281 F.2d 184 (2d Cir.), *cert. denied*, 364 U.S. 845 (1960).

[2] Transcript, pp. 658-663, 744, 1041-1046, 1061.

[3] Brief of appellant King, pp. 15-22; brief of appellant Zogby, pp. 10-21; brief of appellant Mazza, pp. 16-20; brief of appellant Talerico, pp. 12-16.

[4] Pp. 6-10.

[5] *Simmons* v. *United States*, *supra*, 354 F. Supp. at 1386, 491 F.2d at 761; *Panico* v. *United States*, 412 F.2d 1151 (2d Cir. 1969), *cert. denied*, 397 U.S. 921 (1970); *Williams* v. *United States*, 334 F. Supp. 669 (S.D.N.Y. 1971), *aff'd*, 463 F.2d 1183 (2d Cir.), *cert. denied*, 409 U.S. 967 (1972).

[6] 18 U.S.C. § 2255. See *Fontaine* v. *United States*, 411 U.S. 213 (1973).

October 2, 1975

Hon. Lloyd F. MacMahon
U.S. District Court Judge
9 Ogden Avenue
White Plains, New York

Re: United States of America vs. Louis Charles King, et al
75-CV-172
73-CR-9

Dear Judge MacMahon:

I have received your recent Memorandum in regards to the above-captioned matter dismissing the defendant King's motion made pursuant to 28 U.S.C. Section 2255.

I was surprised to receive this Memorandum since on July 25, 1975, I forwarded to the Office of the United States District Court Clerk, Federal Building, Utica, New York, a letter advising the Court that I had been instructed by my client, Louis King, to withdraw the motion which was pending before the Court since my client had written to me and advised me to withdraw the motion on his behalf.

I had not contacted him prior to the time of making the motion since I felt he would have no objection, but once the motion was filed and after he was advised I did receive a letter instructing me to withdraw on his behalf.

If an Order is presented to you by the United States Attorney's Office I would appreciate your striking out any mention of the defendant, Louis Charles King Jr.

Page 2
Hon. Llyod MacMahon
October 2, 1975

I am enclosing herein a photostatic copy of the letter which I sent to the United States District Court Clerk dated July 25, 1975, together with the receipts indicating that it went out by certified mail.

A copy of the letter was sent to Eugene Welch, Esq., United States Attorney General, Federal Building, Syracuse, New York.

Very truly yours,

LOUIS T. BRINDISI, ESQ.
LTB:sm
Enclosures

bps: Dear Lou:

I have been on trial and the Decision came in and I am enclosing herein a copy of the Memorandum,denying the motion, of Judge MacMahon.

I had sent letters pursuant to your request to the United States District Court Clerk with a copy to Eugene Welch instructing then to withdraw the Motion made on your behalf. I am enclosing herein for your benefit copies of the letter dated July 25, 1975. This letter was sent certified mail, return receipt requested to Eugene Welch and the United States District Court Clerk's.

I have sent the above letter to Judge MacMahon.

I just want you to know that I did follow your instructions in attempting to withdraw the motion.

With kindest personal regards, I remain,

Very truly yours,

LOUIS T. BRINDISI, ESQ.
LTB:sm
Enclosures

July 25, 1975

United States District Court Clerk
United States District Court
Federal Building
Utica, New York 13503

RE: United States vs Louis Charles King, Jr.
75-CV-172
In reference to the Defendant's Motion pursuant to 28-USC-Section 2255

Gentlemen:

I have been instructed by my client, Louis King, to withdraw the Motion pending before this Court, which was filed on his behalf pursuant to 28-USC-2255.

Therefore, at my request and at the request of my client, I would appreciate your advising the Court that the Motion presently pending on behalf of Mr. King is to be withdrawn, and that there should be no decision based upon that Motion.

If further papers are needed, please advise.

Very truly yours,

LOUIS T. BRINDISI

LTB/dp
cc: Eugene Welch, Esq.
Assistant U. S. Attorney
United States Department of Justice
Federal Building
Syracuse, New York 13201

PS Form 3811, Nov. 1973 RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

● SENDER: Complete items 1 and 2.
Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one).
☑ Show to whom and date delivered.............. 15¢
☐ Show to whom, date, & address of delivery.. 35¢
☐ DELIVER ONLY TO ADDRESSEE and show to whom and date delivered.............. 65¢
☐ DELIVER ONLY TO ADDRESSEE and show to whom, date, and address of delivery.............. 85¢

2. ARTICLE ADDRESSED TO:

3. ARTICLE DESCRIPTION:

| REGISTERED NO. | CERTIFIED NO. | INSURED NO. |
|---|---|---|
|  | 916[illegible] |  |

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE US Atty / [illegible]

4. DATE OF DELIVERY JUL 28 1975 POSTMARK

SYRACUSE, NY REGISTRY JUL 28 1975

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE: CLERK'S INITIALS

* GPO : 1974 O - 537-803

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PS Form 3811, Nov. 1973 RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

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☐ DELIVER ONLY TO ADDRESSEE and show to whom and date delivered.............. 65¢
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2. ARTICLE ADDRESSED TO:

3. ARTICLE DESCRIPTION:

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|---|---|---|
|  | 916315 |  |

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE J. Ford, Dep. Clerk

4. DATE OF DELIVERY JUL 28 1975 POSTMARK

USPS JUL 28 1975

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE: CLERK'S INITIALS

* GPO : 1974 O - 537-803

State of New York)
: SS
County of Oneida)

June 24, 1976

Mrs. Michelle Malina being duly sworn on her oath deposes and says:

1. I am over 18 years of age and reside at 928 Schuyler Ave Utica NY.

2. On October 26, 1975, I was present when Mrs Helen Postal signed the attached affidavit. On this occasion I also signed the document which I am resigning today, June 24, 1976.

At the time Mrs Postal stated that she was a juror in the conspiracy/extortion trial of four men including Louis Charles King in February of 1973. She further stated that during the trial she and the other jurors stayed at the Ramada Inn on Burrstone Road in New Hartford, N.Y. During her stay she read newspaper accounts of the trial and saw television coverage as well. Mrs Postal also confirmed that she and the other jurors dined in the Ramada Inn's main dining room which was open to the public.

When the trial resumed on February 27, 1973, Mrs Postal stated in my presence that she was aware why Mr. King was in St Luke's Hospital.

Sworn to me this
24th day of June 1976

JOSEPH T. MULLEN
NOTARY PUBLIC, State of New York
No. 01-2[illegible]08635
Qualified in Rockland County
Commission Expires March 30, 1977

Joseph T Mullen
Notary Public

Michelle Malina
Michelle Malina

STATE OF NEW YORK
COUNTY OF ONEIDA

## AFFIDAVIT

1. I, Mr(s) Helen Rostal am a resident of the City of Utica, County of Oneida, of the State of New York, hereby state that the following is true and to the best of my knowledge.

2. February 20, of 1973, I was sworn and seated as a juror in the conspiracy, extortion trial of four men from the Utica area.

3. During the duration of this trial, myself and the other jurors stayed at the Ramada Inn which is located on Burrstone Road in the City of New Hartford, New York.

4. During my stay at the Ramada Inn I did have opportunities to read newspapers at which time I did ✓, did not ______ read articles concerning this case.

5. As best as I can remember, television was available in my room which I occasionally watched and in doing so I did ✓, did not ______ news briefs of this case.

6. During the trial the jury as a whole which I was part of did eat breakfast and dinner in the main dining room which was open to the public.

7. I did make or I did receive one or more telephone calls in reference to my general welfare.

8. When trial resumed on Tuesday, the 27th of February 1973, and court convened in Saint Lukes Hospital, I was ✓, I was not ______ aware why the defendant was in the hospital at that time.

Mrs. Helen Bosese
Affiant

Sworn to and attested before me this 6/26 day of 75, 1975.

County of Oneida, State of New York.

My commission expires [illegible]

Michelle Malia
M. Vict Santia
Notary Public

Witness: Michelle Mak...

HENRY J. BOITEL
COUNSELLOR AT LAW

233 BROADWAY
NEW YORK, N. Y. 10007
(212) RECTOR 2-8104

September 8, 1976

Mr. Ronald Wakeel
c/o The Ramada Inn
1710 Burrstone Road
New Hartford, New York

Reference: Louis Charles King, Jr. v.
United States of America.

Dear Mr. Wakeel:

Pursuant to our telephone conversation of today, I am enclosing herewith the original and two copies of an affidavit which I believe reflects the contents of our conversation. If the affidavit reflects the facts, I would appreciate your executing the original and a copy in the presence of a Notary, who should then notarize them in the place provided. Please take note of paragraph (13) of the affidavit which calls for you to initial each page of the document.

In the event that the affidavit, as drawn, misstates some fact, or if you wish to add or modify some statement so as to have the affidavit more accurately reflect the events in question, please feel free to make such changes as you deem appropriate. If you or your attorney wish to contact me with respect to the affidavit, either or both of you should feel free to do so.

My only requests are that the matter be completed as soon as possible and that you only state the truth as you know it.

The extra copy of the affidavit is for your files.

Very truly yours,

Henry J. Boitel
HENRY J. BOITEL

HJB:ljg
encs.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----------------------------x

LOUIS CHARLES KING, JR., :

Petitioner, :

-vs.- :

UNITED STATES OF AMERICA, :

Respondent. :

-----------------------------x

AFFIDAVIT

State of New York )
) ss.:
County of )

RONALD WAKEEL, being duly sworn, deposes and says:

1. I am the manager of the Ramada Inn located at 1710 Burrstone Road, New Hartford, New York, and I was so employed in February and March, 1973.

2. On February 24, 1973, a Saturday, I was on duty at the Ramada Inn throughout the day and into the evening. Prior to, during and subsequent to that day, a sequestered Federal jury was lodged at the Ramada Inn. Upon information and belief, that jury had been empanelled in and was sitting with respect to a trial in the United States District Court for the Northern District of New York of the case of United States of America v. Louis Charles King, Jr., and others. At a point during the course of the evening of February 24, 1973, I was in the Ramada Inn lounge. As I left the lounge for the

purpose of obtaining a pack of cigarettes, I became aware of a disturbance in the driveway area of the Ramada Inn. I went to see what was happening, and learned that an incident had occurred in which the above noted Louis Charles King had been shot and was lying on the ground of the driveway. A number of Federal and State law enforcement officers were in the area, and I indicated to one of them that steps should be taken to secure the jury. I was eventually told to shut off the elevator in the Ramada Inn, and I caused that to be done.

3. To the best of my recollection, the jurors were lodged on the second and third floors of the Ramada Inn, as were several marshalls. I believe the trial judge had a room on the third floor. The Ramada Inn records concerning where these various individuals were lodged, are still in existence and will be made available to the Court upon request.

4. I assume that the jurors were in their rooms or in the vicinity thereof, at the time of the incident concerning Mr. King [hereinafter, "The Incident"]. I have no recollection of seeing any of the jurors in the vicinity of the incident or on the first floor of the Ramada Inn.

5. From my knowledge of the area in which the jurors' rooms were located, I know that from at least some of the rooms it may have been possible for a person to see from the room window some of the police cars that arrived at the scene of the incident; however, it would not have been possible

for an individual so situated to see the place or places where Mr. King was lying on the ground.

6. I believe that some of the jurors may have been two to a room and others may have been one to a room. This, too, can be determined from the Ramada Inn records.

7. Each of the jurors' rooms had a telephone. The telephone system in effect at the time operated as follows: the jurors could direct-dial out of the premises by dialing "9" and then the telephone number they wished to call. No switchboard or other device for monitoring the content of such telephone calls or for preventing the unfettered use of the telephones was in effect at any time during the course of the jurors' stays at the Ramada Inn. However, for billing purposes, a meter recorded such telephone use. The records of any outgoing calls that may have been made from the jurors' telephones are still in existence and will be made available upon request of the Court. With respect to incoming calls, all such calls were received by the Ramada Inn switchboard operator. In the event that an outside caller requested to speak to a juror or wished to reach a telephone in one of the jurors' rooms, the switchboard operator was under directions to direct the call to one of the United States Marshalls who was charged with supervising the jury sequestration. I do not know what disposition the U.S. Marshall would make of such calls. In short, with the exception of the routing of incoming calls

to the U.S. Marshalls, the telephone system operated precisely the same for the jurors as it did for all other guests of the Ramada Inn. There are public telephones in the Motel, and I do not know whether or not any of the jurors had occasion to use those telephones at any time during their stay at the Ramada Inn.

8. During the course of their stay at the Ramada Inn, the jurors took their meals in the same common dining room that was used by the other guests of the Motel, and by various others who were merely restaurant patrons. During that portion of the jurors' stay at the Ramada Inn which followed the incident, the jurors were taken into and departed from the dining room through the same doors of the dining room that were used for entry by the general public. The jurors would be taken past the other patrons of the dining room and would be seated at the rear of the dining room. I cannot say that any juror in fact observed any newspapers that other guests in the dining room may have had or may have been reading; however, if such other guests had such newspapers in open view, the jurors would have been able to see such newspapers as they passed. Similarly, there were other patrons seated at tables in the proximity of where the jurors were, and if such guests had newspapers in open view, the jurors would have been able to see such newspapers. Finally, if any of the other guests who were seated at tables that the jurors passed or were seated at

tables adjoining the tables of the jurors, engaged in conversation, then it would have been possible for the jurors to have overheard such conversation. I repeat that I have no knowledge of whether any particular juror actually read any portion of any newspaper under such circumstances or actually overheard any conversation under such circumstances. My only purpose is to describe for the Court, to the best of my recollection, the physical circumstances under which the jurors were in the proximity of other persons who used the dining facility.

9. During the period of time that the jurors were lodged at the Ramada Inn, there were racks in front of the lobby desk for the sale of newspapers. Under normal circumstances, one who wished to purchase a newspaper would take a paper from the rack and then pay the cashier. However, by arrangement with the United States Marshalls, when it was anticipated that the jurors would be coming through the lobby, which, for example would be the case when they were going to or coming from their meal, there was a standing instruction that the newspapers were to be removed from the racks and placed behind the lobby desk. It may be noted that if a juror had reason to make some inquiry at the desk, it might have been possible for the juror to see the newspapers behind the desk. However, I have no knowledge of whether or not any juror ever observed a newspaper in the racks or behind the desk.

10. There was a normal television set in the room

of each juror. Such television sets were in the rooms of the jurors from the outset of their stay at the Ramada Inn through to the termination of their stay at the Ramada Inn, with the following exception. The incident occurred on a Saturday night. I know that the television sets remained in the rooms through that night and throughout the following Sunday. During one of the weekdays of the following week, at a time when the jurors were not in the Ramada Inn (I assume they were at the trial), the Marshalls instructed that the television sets should be removed from the rooms of the jurors. We were in the process of removing the television sets when, within the hour, the Marshalls instructed that the television sets should be left in the jurors' rooms. As we were putting back those of the television sets that had been removed, the jurors arrived back at the Ramada Inn. The television sets thereafter remained in the jurors' rooms throughout the remainder of their stay.

11. I have no reason to believe that any of the television sets in question were not in working order. Each of the television sets was operated from within the room, and at no time during the period that the jurors were sequestered was any device in effect which would have physically prevented any juror from turning his television set on and off or which would have limited the television programs available to the sets. In short, the television sets in the jurors' rooms functioned in the same manner as the television sets in the rooms of the

other guests of the Ramada Inn. I am not aware of any device in operation at the Ramada Inn which would have enabled anyone outside of a juror's room, short of eavesdropping, to know whether a television set was on or off or to know what if any broadcast was being viewed and heard on the television sets.

12. I have made this affidavit at the request of Henry J. Boitel, Esq., who has advised me that he represents the aforesaid Louis Charles King, Jr. I have made this affidavit of my own free will, without any promise or suggestion of reward, consideration, or threat of any kind. My sole purpose for making this affidavit is to assist the Court by revealing any information I may have. If the defense, the government, or the Court should require my presence in Court to testify as a witness with respect to these facts I will, of course, comply with my obligation to do so.

13. I have carefully read each page of this affidavit, which consists of seven (7) pages, and I have initialed each page of both the original and of a duplicate copy.

Respectfully submitted,

RONALD WAKEEL

Sworn to before me this
day of , 1976

NOTARY PUBLIC

HENRY J. BOITEL
COUNSELLOR AT LAW

233 BROADWAY
NEW YORK, N. Y. 10007
(212) RECTOR 2-5104

September 16, 1976

Andrew S. Kowalczyk, Jr.
Kernan & Kernan
First National Bank Building
Utica, New York 13501

CERTIFIED MAIL:
RETURN RECEIPT REQUESTED

Reference: Louis Charles King, Jr. v. United States of America.

Dear Mr. Kowalczyk:

This will confirm your telephone call to me today, at approximately 1:40 p.m. in which you advised me as follows:

1. You were calling in behalf of Ronald Wakeel, the manager of the Ramada Inn in New Hartford, New York;

2. Mr. Wakeel has received my letter of September 8, 1976, together with a proposed affidavit for his execution, both in connection with the above noted case;

3. The local board of directors at the Ramada Inn at which Mr. Wakeel is employed has directed him not to execute any affidavit with respect to the above noted matter;

4. The board of directors would not oppose the taking of Mr. Wakeel's deposition, if such deposition is ordered to be taken by a Court and if the United States Attorney's Office is given the opportunity to attend and also examine Mr. Wakeel.

It is my understanding that Mr. Wakeel does not personally have any objection to executing an affidavit attesting to the truth as he knows it, and that the only obstacle to his doing so is the restraint placed upon him by his employer. I earnestly request that you reconsider with the board of directors the question of whether they will persist in their position. Both the proper administration of justice and the liberty of an individual are at stake. As we discussed on the telephone, a court order directing a hearing or deposition must normally be taken within the context of a proceeding commenced by affidavit.

As an alternative to executing an affidavit, I have absolutely no problem with taking Mr. Wakeel's deposition at any place in the Utica area, on notice to the United States Attorney's Office, with opportunity for that Office to ask any questions of Mr. Wakeel that it may wish. If such a procedure would suffice to cause the board of directors to withdraw the prohibition which they have imposed upon Mr. Wakeel, it can be quickly arranged. If, however, they persist in requiring that a judge order the taking of such a deposition, they may well be frustrating the only route available to secure judicial involvement. The trial judge has already held that he will not order a hearing based upon hearsay as regards Mr. Wakeel's knowledge.

If I have misstated or omitted any material aspect of our conversation, please advise me so that the record can be set straight. Likewise, I would appreciate hearing from you as to whether the board of directors of the Ramada Inn, upon reconsideration, will either permit Mr. Wakeel to execute an affidavit or attend at an oral deposition, in the absence of a court order.

Very truly yours,

HENRY J. BOITEL

HJB:ljg

cc: Mr. Ronald Wakeel
c/o Ramada Inn

**SENDER:** *Be sure to follow instructions on other side*

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## RECEIPT

Received the numbered article described below

REGISTERED NO.

CERTIFIED NO. 226001

INSURED NO.

DATE DELIVERED

① SIGNATURE OR NAME OF ADDRESSEE *(Must always be filled in)*
Andrew Korrelozyh

② SIGNATURE OF ADDRESSEE'S AGENT, IF ANY
Mary Little

③ SHOW WHERE DELIVERED *(Only if requested, and include ZIP Code)*
185 Genesee – Utica NY
13501